(13)

No. 87-154-CFX
Status: GRANTED

Docketed:
July 17, 1987

Title: Joshua Deshaney, a Minor, by his Guardian ad Litem, and Melody Deshaney, Petitioners
v.
Winnebago County Department of Social Services, et al.

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Sullivan,Donald James

Counsel for respondent: Mingo,Mark J.

Entry	Date	Note	Proceedings and Orders
1	Jul 17 1987	G	Petition for writ of certiorari filed.
2	Aug 26 1987		Brief of respondents Winnebago County Dept. of Social Services, et al. in opposition filed.
3	Sep 2 1987		DISTRIBUTED. September 28, 1987
5	Feb 29 1988		REDISTRIBUTED. March 4, 1988
7	Mar 8 1988		REDISTRIBUTED. March 18, 1988
8	Mar 21 1988		Petition GRANTED.
			**********
10	Apr 22 1988		Order extending time to file brief of petitioner on the merits until June 4, 1988.
11	May 13 1988		Record filed.
		*	Certified copy of proceedings received.
12	May 19 1988		Record filed.
		*	Certified copy of original record received.
13	May 27 1988		Order further extending time to file brief of petitioner on the merits until June 13, 1988.
16	Jun 10 1988	G	Motion of American Civil Liberties Union Children's Rights Project, et al. for leave to file a brief as amici curiae filed.
14	Jun 13 1988		Joint appendix filed.
15	Jun 13 1988		Brief of petitioner Joshua Deshaney filed.
17	Jun 13 1988	G	Motión of Massachusetts Committee for Children and Youth for leave to file a brief as amicus curiae filed.
21	Jun 16 1988		Order extending time to file brief of respondent on the merits until August 13, 1988.
18	Jun 27 1988		Motion of American Civil Liberties Union Children's Rights Project, et al. for leave to file a brief as amici curiae GRANTED.
19	Jun 27 1988		Motion of Massachusetts Committee for Children and Youth for leave to file a brief as amicus curiae GRANTED.
31	Jun 28 1988	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
26	Jul 14 1988		Brief amicus curiae of National School Boards Assn. filed.
22	Aug 12 1988		Brief of respondents Winnebago County Dept. of Social Services, et al. filed.
23	Aug 12 1988		Brief amici curiae of New York, et al. filed.
24	Aug 12 1988		Brief amicus curiae of United States filed.
25	Aug 12 1988		Brief amici curiae of National Association of Counties, et al. filed.

No. 87-154-CFX

Entry	Date	Note	Proceedings and Orders
27	Aug 18 1988		CIRCULATED.
28	Aug 29 1988		Set for argument. Wednesday, November 2, 1988. (3rd case) (1 hr).
29	Sep 3 1988	G	Application (A88-190) to extend the time to file a reply brief from September 11, 1988 to September 19, 1988, submitted to Justice Stevens.
30	Sep 8 1988		Application (A88-190) granted by Justice Stevens extending the time to file until September 19, 1988.
32	Sep 16 1988	X	Reply brief of petitioner Joshua Deshaney filed.
33	Oct 3 1988		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
34	Nov 2 1988		ARGUED.

87-154

FILED
JUL 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE UNITED STATES SUPREME COURT

OCTOBER, 1986 TERM

NO. _____

JOSHUA DESHANEY, a Minor, by his Guardian ad Litem, and MELODY DESHANEY,

Petitioners (Plaintiffs)

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES; WINNEBAGO COUNTY, ANN KEMMETER and CHERYL STELSE,

Respondents (Defendants).

On Appeal from the Decision and Order of the Seventh Circuit Court of Appeals

---

PETITION FOR WRIT OF CERTIORARI

Donald James Sullivan, Esq.
P.O. Box 1854
Cheyenne, WY 82003

Curry First, Esq.
823 N. Cass Street
Milwaukee, WI 53202

Attorneys of Record for Petitioners-Plaintiffs

QUESTIONS PRESENTED FOR REVIEW

This case presents the following questions for review:

1. Whether reckless, willful and wanton, or grossly negligent misconduct of public officials is enough to trigger the protections of the Due Process Clause.

2. Whether the deliberate refusal of child protection officials to act to protect an identified individual child already under their auspices, and actually known to them to be in extreme danger of death or profound injury, from an identified and known imminent danger, can be sufficiently reckless, willful and wanton, or grossly negligent as to impose

liability under 42 USC 1983.

3. Whether egregious misconduct of public officals, rising to the level of gross negligence or willful and wanton misconduct, leading to massive personal injury to an infant citizen, is excluded from the application of the civil rights laws on the basis that the misconduct was omissive in nature.

LIST OF ALL PARTIES

All parties to this proceeding in this Court, and in the Court below, are identified in the caption. Not identified are Randy DeShaney, the abusing parent, who was a party defendant in the original Complaint, and the State of Wisconsin, which was dismissed by the trial court as a party defendant. Mr. DeShaney is presently incarcerated by reason of the matters involved herein.

TABLE OF CONTENTS

	PAGE NO.
Questions Presented:	1
List of Parties:	3
Table of Contents:	4
Table of Authorities:	7
Summary of the Case Below:	8
Grounds of Jurisdiction:	9
Constitutional Provisions and Statutes Involved:	10
Statement of Facts:	12
Summary:	12
Details:	13
Basis of Original Jurisdiction:	24
Argument:	
Introduction:	25
I. The Decisions of the Courts of Appeal on This Issue are Now in Conflict as a Result of the Decision in the Court Below.	27

II. This Court Itself Recently Noted the Significance of This Question and the Appropriateness of its Determination in a Proper Case.	30
III. The Question of Sec. 1983 Liability for Extreme Negligence is Important to Every Child Protection Agency and to Every Endangered Child.	32
IV. Conclusion.	34
Certificate of Service	35
Appendix:	
United States Court of Appeals for the Seventh Circuit - Opinion:	36
United States District Court - Eastern District of Wisconsin - Decision:	47
United States District Court - Eastern District of Wisconsin - Judgment:	76
United States Court of Appeals for the Seventh Circuit - Judgment Affirming	

Trial Court ruling: 78

United States Court of Appeals for the Seventh Circuit - Order Denying Rehearing: 80

TABLE OF AUTHORITIES

	PAGE NO.
Daniels v. Williams, 474 U.S. ____, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986):	30
Davidson v. Cannon, 474 U.S. _____, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986):	30
Doe v. New York City Department of Social Services, 649 F.2d 134 (2nd Cir. 1981):	27
Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3rd Cir. 1985):	27
Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), cert. denied, ____ U.S. ____, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985):	27
28 USC Section 2101:	9
42 USC Section 1983:	11,24,28 30,32,33
U.S. Constitution, Fourteenth Amendment:	10,25,31

SUMMARY OF THE CASE BELOW

1). The United States District Court for the Eastern District of Wisconsin granted Defendants' motion for summary judgment, and entered judgment thereon, on June 20, 1986.

2). The Court of Appeals for the Seventh Circuit heard oral argument on the appeal on January 13, 1987, and rendered its opinion, and entered judgment thereon, February 12, 1987.

3). Plaintiffs-Petitioners filed a motion for rehearing, with suggestion for rehearing en banc, on February 25, 1987, and the Court of Appeals entered an Order Denying Rehearing on April 21, 1987.

STATEMENT OF GROUNDS JURISDICTION IN THIS COURT

a) This Petition seeks review of a judgment of the Court of Appeals for the Seventh Circuit, which was entered on February 12, 1987.

b) The Seventh Circuit entered its Order Denying Rehearing on April 21, 1987. No Order has been entered extending the time for the Petition for Writ of Certiorari.

c) Petitioners believe this Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 USC Section 2101.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Due Process Clause of the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 USC 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF FACTS

- Summary -

Four-year-old Joshua DeShaney became totally and permanently brain-damaged as of March 8, 1984, because of the cumulative effects of a continuing process of physical abuse commited upon him by his father and the father's paramour. Fourteen months before his injuries became irreparable the local child protection agency began its active case management of Joshua's physical abuse situation, initially arranging for protective custody for his physical protection from abuse; the defendant officials returned him to the abusive home, on their own decision and without

court action, and actively followed him at all times thereafter, dutifully recording in internal documents the child's deteriorating situation and their fears for his safety but taking no action whatever to protect the child.

- Details -

In January of 1982 the Winnebago County Department of Social Services was notified, via the police department, that one Randy DeShaney was abusing his tiny son, Joshua (the infant plaintiff herein). The DSS had a special division, the Child Protection Unit, whose precise function was to identify and protect

endangered children. (This was in response to the declared policy of Wisconsin law mandating affirmative efforts to protect endangered children and intervene on their behalf). The DSS interviewed the father, who denied the assertions against him; DSS did nothing further and closed its file.

In January, 1983, Joshua was seen in a local emergency room as a victim of child abuse, and the DSS was notified. At this time they arranged for temporary legal custody of Joshua to be taken, nominally by the hospital, while the County investigated. The investigation resulted in a multidisciplinary team meeting held in accordance with

established policy, at which the physicians, the child psychologist, the nurses, the police officers, the DSS caseworker and DSS supervisor, and the county's civil attorney were in attendance. All present acknowledged that Joshua had probably been abused. The county civil attorney, however, announced that he was unwilling to bring this abuse case to court, for undocumented reasons. The DSS officials filed their internal report, noting that child abuse was strongly suspected and promising that they would continue to actively and closely monitor the child. Most especially, these defendants promised that they would reconvene a team meeting

and bring Joshua to the Court for protection at the first additional indication of child abuse, with defendant Kemmeter saying in her report:

"I therefore recommend that the temporary physical custody order and any further allegations against this family be dismissed at this time but will refer it back into Court should there be any further injuries to this child of an unexplained nature."(Emphasis supplied).

The County gave up any thought of custody of Joshua and, on its own initiative and without a hearing, handed him back to his abusing father and the father's abusing girlfriend.

The County DSS also entered into a contract with the father whereby he was to get certain counseling, remove the girlfriend from the home, and enroll

Joshua in Head Start (thus providing independent monitoring of the child's condition). This agreement between the County DSS and the father for Joshua's benefit was ignored as soon as it was made, yet no action was taken by DSS.

Over the next fourteen months Joshua was seen repeatedly in hospital emergency rooms for suspicious traumatic injuries. On November 30, 1983, the emergency room physician directed the ER nurses to file a written child abuse report on Joshua, which they did. This report was communicated to the DSS caseworker, but nothing was done to follow up on it. DSS did not even interview the family or observe the child about this formal

medical report of child abuse.

On another occasion a Head Start worker (still trying to get him enrolled per the agreement) found four-year-old Joshua alone at home, and telephoned DSS two separate times to inform them of his immediate jeapordy, yet no action whatever was taken. The worker again telephoned a third time the following day and spoke directly to the caseworker (defendant Kemmeter), describing how she had found Joshua alone and unsupervised, with no idea where the adults were or when they might return. Still no action of any kind was taken.

Throughout this time DSS maintained an open casefile on Joshua, and assigned

a Child Protection Unit worker to his case. She (defendant Kemmeter) visited the home several times (although not in keeping with the Department's own guidelines). She claims to have had a close and caring relationship with Joshua: she would hold him on her lap and read to him, and so on. She repeatedly documented in her casefile her continuing belief that Joshua was in danger, that she did not believe the excuses proffered by the adults for the frequent injuries to Joshua, and that she was extremely worried about him. She and DSS did nothing.

Kemmeter consistently violated the requirements of both good social work and

her own agency by visiting Joshua rarely and intermittently. For the last three months of his conscious life, she even neglected to see Joshua on the few occasions when she did actually go to his home, instead in each instance accepting an excuse about his having a cold or being asleep in the middle of the day.

On one occasion the caseworker herself observed what she has repeatedly described as cigarette burns on Joshua's face. As she later told the Family Court, "On November 9, 1983, the petitioner [Kemmeter] noted markings on Joshua's chin during a home visit which resembled cigarette burns," but she and DSS took no action.

On March 8, 1984, Joshua was again taken to the emergency room. He was found to be in a deep coma, with extensive old bruising and discoloration over all parts of his body. Emergency brain surgery was done in an effort to save his life. The surgeon found massive pools of yellow liquid, consisting of the byproducts of old intracranial hemorrhages (that is, the old blood clots had been there long enough that the red blood had chemically decomposed, and only the yellow bilirubin element remained). He further found that the membrane covering the skull was stained blue, again by reason of the long-term standing and pooling of blood in the brain and the skull. Both of

these, as the surgeon testified at deposition, are unequivocal evidence of brain damage and physical trauma to the skull over a long period of time. The traumas had been inflicted on Joshua well before their cumulative effects eventually put Joshua into a coma and rendered his condition irreversible.

Throughout the time she was handling Joshua's case, the caseworker knew that he had a natural mother (plaintiff Melody DeShaney), who the mother was, and that the mother was from Cheyenne, Wyoming, where the marriage, Joshua's birth and the divorce had occurred. The caseworker had ample means of contacting the mother, but did not do so, despite clear agency

and professional guidelines to do so (and thus enlist another adult to protect Joshua). When it appeared that Joshua would die imminently the caseworker did, for the first and only time, contact the mother, to tell her that Joshua was dying.

When the natural mother and grandmother arrived in Oshkosh, Winnebago County, Wisconsin, the caseworker told them, "I just knew the phone would ring some day and Joshua would be dead."

Joshua has lost nearly half the tissue in his brain, and is profoundly and permanently retarded and brain damaged.

BASIS OF ORIGINAL FEDERAL JURISDICTION

The original basis of jurisdiction was the federal statute (42 USC 1983) creating the cause of action alleged.

ARGUMENT

Presented here are the questions whether aggravated and extreme misconduct of public officials, falling short of actual intent, suffices to trigger the protections of the Due Process Clause, whether child protection officials are liable for harm resulting from their refusal to protect an individual child they actually know to be in serious imminent danger, and whether the egregious misconduct of public officials, rising to the level of recklessness, gross negligence or willful and wanton misconduct, and leading to massive injury to an infant citizen, is excluded from the application of the civil rights laws

on the basis that the misconduct was passive in nature.

Petitioners believe this Court should grant Certiorari in this instance for three reasons: first, there now exists a clear split of authority among the Circuits on this question; second, this Court itself recently noted the significance of this question and the appropriateness of its determination in a proper case; and, third, the prompt resolution of this question is of major importance to several thousand child protection agencies and untold numbers of endangered children in this country.

I. The Decisions of the Courts of Appeal on This Issue Are Now in Conflict as a Result of the Decision in the Court Below.

The question at issue was addressed by three Courts of Appeal prior to the decision in the Court below. Doe v New York City Department of Social Services, 649 F.2d 134 (2nd. Cir. 1981); Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3rd. Cir. 1985); Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), cert. denied, ___ U.S. ____, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985).

All three of those other Circuits decided, in highly similar factual circumstances, that in proper factual settings the aggravated misconduct of public officials in failing to protect a

particular child whom they knew to be in serious physical danger (whether the misconduct is denominated as recklessness, willful and wanton misconduct, gross negligence, or by some other similar phrase) does constitute an actionable wrong under 42 USC 1983.

The same question was presented in the Court below. The Seventh Circuit pointedly noted that the misconduct here involved is extreme and unjustifiable. However, unlike the other Circuits, the Court below ruled that even profoundly aggravated misconduct (such as it found to exist in this case) could not, as a matter of law, give rise to enforceable rights under Sec. 1983. In effect it

ruled that the only actionable misconduct in such cases would be where the public official physically commits the assault, and that to stand by and allow another to commit the act, despite overwhelming awareness of the impending danger to the child, is of no legal significance.

II. This Court Itself Recently Noted the Significance of This Question and the Appropriateness of its Determination in a Proper Case.

In the companion cases of Davidson v. Cannon, 474 U.S. ___, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986) and Daniels v. Williams, 474 U.S. ___, 88 L.Ed.2d 662, 106 S.Ct 662 (1986) this Court ruled that mere ordinary negligence cannot be the predicate for Sec. 1983 liability. The Court went out of its way to enunciate that only garden-variety negligence was being there addressed, and that those decisions did not address the question of liability for aggravated misconduct. The Court, at footnote 3 in Daniels, said:

". . .[T]his case affords us no occasion to consider whether something less than intentional conduct, such as recklessness

or 'gross negligence', is enough to trigger the protection of the Due Process Clause."

The present case squarely raises the question which this Court noted to be still in need of resolution.

III. The Question of Sec. 1983 Liability for Extreme Negligence is Important to Every Child Protection Agency and to Every Endangered Child.

Petitioner agrees with the observation of the Court below that a ruling in Petitioners' favor would be of major significance to every child protection agency in the nation. Awareness of prospective liability is, of its very nature, conducive to amelioration of conduct. This is the prophylactic effect of the law.

As matters presently stand, no agency anywhere can be certain of its legal obligations, since the Circuits have divided on the question. In view of the potential significance and

application of the answer to the question posed it appears it would be helpful to every agency to know, definitively, how assertive they must be in intervening to protect an endangered child; or, alternatively, how far they may go in turning a blind eye to a child's plight, so long as they do not themselves physically commit the abuse.

Finally, on the assumption that a declaration of the application of Sec. 1983 to these aggravated cases would engender more emphatic protection of endangered children, one can expect that there are presently alive in this country children who are being physically abused who will benefit directly from a Court-

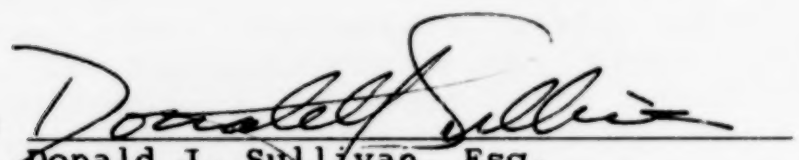
encouraged increase in vigilance by the designated public authorities, in cases like this one where the authorities have actual knowledge of the pattern of abuse.

CONCLUSION

For the reasons noted, resolution by this Court of the questions presented is both appropriate and urgent, and the writ of certiorari should issue.

Dated this 14th day of July, 1987.

JOSHUA DESHANEY et al., Petitioners

by: 

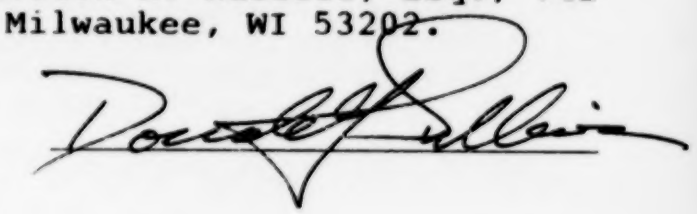
Donald J. Sullivan, Esq.
P.O. Box 1854
Cheyenne WY 82003
(307) 634-0112

and

Curry First, Esq.
823 North Cass Street
Milwaukee, WI 53202
(414) 272-7400

CERTIFICATE OF SERVICE

I hereby certify that on the 25 day of July, 1987, a true and accurate copy of the foregoing Petition for Writ of Certiorari was deposited in the United States mail, postage prepaid, addressed to: Mark J. Mingo, Esq., 611 N. Broadway, Milwaukee, WI 53202; John Possi, Esq., P.O. Box 1807, Madison, WI 53701; and Patrick R. Russell, Esq., 741 N. Milwaukee, Milwaukee, WI 53202.



In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2188

JOSHUA DESHANEY, a minor, by his guardian ad litem, Curry First, Esq.; and MELODY DESHANEY,

Plaintiffs-Appellants,

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, et al ,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin, Milwaukee Division.
No. 85 C 310—**John W. Reynolds,** *Judge.*

ARGUED JANUARY 13, 1987—DECIDED FEBRUARY 12, 1987

Before POSNER and COFFEY, *Circuit Judges*, and GRANT, *Senior District Judge.**

POSNER, *Circuit Judge.* This appeal requires us to decide whether a reckless failure by Wisconsin welfare authorities to protect a child from a parent's physical abuse deprives the child of liberty or property within the meaning of the Fourteenth Amendment.

---

* Hon. Robert A. Grant of the Northern District of Indiana, sitting by designation.

Since the case was dismissed on summary judgment, we state the facts as favorably to the plaintiffs as the record will allow. The principal plaintiff, Joshua DeShaney, was born in 1979, the son of Melody and Randy DeShaney (Melody is also a plaintiff). Joshua was born in Wyoming, where the DeShaneys then lived and where his mother still lives. In 1980 a court in Wyoming granted the DeShaneys a divorce. The court awarded custody of Joshua to his father. Shortly afterward, Randy moved to Wisconsin, bringing Joshua with him. There he married (and shortly afterward divorced) a woman whose lawyer told the police in 1982 that Randy had "hit the boy, causing marks and is a prime case for child abuse."

In January 1983, Randy DeShaney's girlfriend, Marie, brought Joshua to a hospital. He was covered with bruises and abrasions—from an attack by another child, she said, but the emergency room personnel suspected child abuse. They notified the Winnebago County Department of Social Services immediately, and by the end of the day that Joshua had been admitted to the hospital the Department had obtained an order from a Wisconsin juvenile court placing him temporarily in the hospital's custody. See Wis. Stat. §§ 48.13(3), 48.19, 48.207. Three days later an ad hoc "child protective team," consisting of a pediatrician, a psychologist, a police detective, a lawyer for the county, a caseworker for the Department named Ann Kemmeter, her superior, and others, discussed the situation. On the basis of this discussion the county's lawyer decided that there was insufficient evidence of child abuse to retain Joshua in the custody of the court (authorized by Wisconsin law if "probable cause exists to believe that if the child is not held he or she will . . . be subject to injury by others," Wis. Stat. § 48.205(1)(a); see also §§ 48.19, 48.21). So Joshua was returned to Randy DeShaney's custody. The team recommended, however, that Randy be required to enroll Joshua in the Headstart program, receive counseling from the Department, and tell Marie to move out of Randy's house—for Randy had suggested that she might be abusing Joshua. This recommendation was

embodied in a written agreement between Randy and the Department, a form of informal disposition of juvenile cases that Wisconsin law authorizes. See Wis. Stat. § 48.245.

Three weeks later the court closed the child-protection case that the Department had brought. A month after this Ann Kemmeter received word from the hospital that Joshua had again been treated for suspicious injuries. But after talking to the hospital's social worker she concluded that there was no evidence of child abuse.

Ann Kemmeter visited the DeShaney household in May. She noticed a bump on Joshua's forehead. Randy and Marie said he had gotten it falling off a tricycle. Kemmeter visited the household again in July, and noticed that Marie still hadn't moved out and that Joshua still hadn't been enrolled in Headstart. In September she visited again and asked to see Joshua but was told by someone that Randy and Marie had taken Joshua to the emergency room with a scratched cornea. In October she visited again and noticed another bump on Joshua's head. On her next visit, which was in November, she noticed that Joshua had a scrape on his chin; it looked to her like a cigarette burn. Later that month Joshua was treated at the emergency room for a cut forehead, bloody nose, swollen ear, and bruises on both shoulders. Emergency room personnel notified the Department of Social Services that they believed that he was a victim of child abuse, but there was no reaction from the Department.

Kemmeter next visited the DeShaney household in January (1984), but was told she couldn't see Joshua because he was in bed with the flu. She returned on March 7 and was told that several days earlier Joshua had fainted in the bathroom for no apparent reason. She did not ask to see him on this occasion—and has not been able to give a reason why not. The next day Randy DeShaney beat Joshua so severely that he critically injured Joshua's brain. The neurosurgeon who treated Joshua found evidence of previous traumatic injury to the head, and Joshua's body was covered with bruises and lesions of different vintages. Joshua's mother was summoned from

Wyoming. When she arrived Kemmeter told her, "I just knew the phone would ring some day and Joshua would be dead." He was not dead, but half his brain had been destroyed. He is confined to an institution for the profoundly retarded, and will remain institutionalized for the rest of his life. Randy DeShaney was convicted of child abuse and given a sentence of two to four years in prison.

This suit, brought by Joshua and his mother, charges Winnebago County, its Department of Social Services, Ann Kemmeter, and her supervisor with having deprived Joshua of his liberty without due process of law, in violation of section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983. Section 1 imposes liability on anyone who, acting under color of state law, "subjects, or causes to be subjected," a person to "the deprivation of" his federal rights. The complaint contains a "pendent party" claim against Randy DeShaney, see *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1359-61 (7th Cir. 1985) (separate opinions), but the district court relinquished jurisdiction of this claim when it dismissed the federal claim on the defendants' motion for summary judgment, see *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966). The court held that the failure of a state agency to render protective services to persons within its jurisdiction does not violate the due process clause.

There are two possible theories on which the defendants (excluding Randy DeShaney, who is not a defendant in the section 1983 count and who was not acting under color of state law when he abused his son) might be thought to have violated Joshua DeShaney's Fourteenth Amendment rights. First, the defendants might be thought to have deprived him of a right—a form of liberty or property—to be protected by the Department of Social Services from the brutalities perpetrated by his father. Second, they might be thought to have deprived him of his right to bodily integrity (again viewed as a form of liberty or property within the meaning of the due process clause) by failing to protect him from his father.

The first theory is foreclosed by the rule, well established in this circuit, that the state's failure to protect

people from private violence, or other mishaps not attributable to the conduct of its employees, is not a deprivation of constitutionally protected property or liberty. See, e.g., *Walker v. Rowe*, 791 F.2d 507, 510 (7th Cir. 1986); *Ellsworth v. City of Racine*, 774 F.2d 182, 185 (7th Cir. 1985); *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984); *Beard v. O'Neal*, 728 F.2d 894, 898-900 (7th Cir. 1984); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir. 1983); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). The First, Eleventh, and District of Columbia Circuits have adopted our view, see *Estate of Gilmore v. Buckley*, 787 F.2d 714, 720-23 (1st Cir. 1986); *Bradberry v. Pinellas County*, 789 F.2d 1513 (11th Cir. 1986); *Washington v. District of Columbia*, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986), and there is also support for it in the Sixth Circuit, see *Janan v. Trammell*, 785 F.2d 557 (6th Cir. 1986). These cases are based on the principle that the Constitution is a charter of negative rather than positive liberties; and while there are exceptions to this as to virtually all legal generalizations—exceptions well discussed in Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864 (1986)—none of them is applicable here. The state does not have a duty enforceable by the federal courts to maintain a police force or a fire department, or to protect children from their parents. The men who framed the original Constitution and the Fourteenth Amendment were worried about government's oppressing the citizenry rather than about its failing to provide adequate social services. For such failures, political remedies (along with such legal remedies as states might see fit to provide in their own courts) were assumed to be adequate. The state may not invidiously withdraw its protection from a disfavored minority without violating the equal protection clause in its most fundamental sense, *Bohen v. City of East Chicago, Inc.*, 799 F.2d 1180, 1190 (7th Cir. 1986) (concurring opinion), but that is not suggested in this case.

So we do not think that the plaintiffs can complain that Joshua was deprived of a federal constitutional right to effective protection from his father, but maybe he can

complain that the state was complicit in the beatings. The terrible injuries that Joshua sustained, which have essentially immobilized him for life, have deprived him of his liberty within the meaning that the courts have given this word in the due process clauses. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982); *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977); *Fernandez v. Leonard*, 784 F.2d 1209, 1214-15 (1st Cir. 1986). The question is whether the state shares responsibility for this deprivation, in a federal constitutional sense, with Joshua's father.

We may assume without having to decide that the failure of the Winnebago Department of Social Services to protect Joshua from his father was a sufficiently aggravated form of negligence to escape the bar of *Daniels v. Williams*, 106 S. Ct. 662, 665, 667 (1986), and *Davidson v. Cannon*, 106 S. Ct. 668, 670 (1986), which hold that simple negligence does not violate section 1983. However, if the defendants, though blameworthy, did not cause Joshua's injuries, they cannot be said to have deprived him of his liberty; deprivation implies causation. And if the conduct of the Department of Social Services didn't appreciably increase the probability of Joshua's injuries, then under conventional tort principles of causation (illustrated by *Weeks v. McNulty*, 101 Tenn. 495, 48 S.W. 809 (1898)), which are presumptively applicable to statutory and constitutional torts as well as to common law torts, see, e.g., *Lossman v. Pekarske*, 707 F.2d 288, 291 (7th Cir. 1983), and cases cited there, the Department did not cause those injuries.

The question how much of an increase in probability is necessary to make an anterior event a "cause" for purposes of tort liability is a vexed problem in the law of torts generally; but we shall not have to explore its outer boundaries in this case; for if the increase in probability is trivial, then under no view of tort liability can the defendant be held to have caused the injury complained of. That is the situation here. This can be seen most clearly by asking whether, if the Department had never existed, Joshua would have sustained the injuries for which he is seeking damages in this suit. The answer, almost certain-

ly, is "yes." For we are supposing a case where the State of Wisconsin has no institutional commitment to preventing child abuse—a gap in its laws that, as we said earlier, would not be actionable in a suit under section 1983. It is unlikely that Ann Kemmeter's well intentioned but ineffectual intervention did Joshua any good at all, but it is most unlikely that it did him any harm. She merely failed to protect him from his bestial father.

Of course in any case of a botched rescue attempt it is possible to speculate that the victim would have been better off without the attempt, because it may have impeded competent attempts at rescue that would have succeeded. This is one of the common rationales offered for the common law tort rule that makes a rescuer liable for his negligence in rescuing even if he had no duty to attempt the rescue in the first place. See, e.g., *United States v. Lawter*, 219 F.2d 559, 562 (5th Cir. 1955). The rule, however, is broader than this rationale; the plaintiff complaining of the defendant's negligent manner of rescue need not prove that, as a matter of fact, the defendant's failure to complete the rescue made it less probable that someone else would rescue him. See *Jackson v. City of Joliet*, *supra*, 715 F.2d at 1202-03. Constitutional tort law, however, which ties a defendant's liability to *depriving* the plaintiff of some right, cannot follow this path of expansion. A state can if it wants, whether acting through its courts or its legislature, impose tort duties on persons who fail to rescue someone whose peril they did not cause—whose liberty they did not take away—but a constitutional tort requires deprivation by the defendant, and not merely a failure to protect the plaintiff from a danger created by others. Thus we held in *Jackson v. City of Joliet*, *supra*, 715 F.2d at 1205—a case in which a policeman waved traffic around a burning car without bothering to look inside (where the plaintiffs' decedents were burning to death)—that a merely conjectural possibility that the state's inaction warned off other potential rescuers is not enough to make the state complicit (in a federal constitutional sense) in the private conduct that caused the victim's injury.

This conclusion is supported by the Supreme Court's holding in *Martinez v. California*, 444 U.S. 277, 285 (1980), that the fact that state inaction might be deemed a proximate cause of the plaintiff's injury under evolving common law notions is not enough to establish a violation of the Fourteenth Amendment. The states are free in the administration of their own tort law to attenuate the requirement of causation as far as they want, even to the point, as we have said, of eliminating it entirely; but deprivation in the constitutional sense requires more than a minimal or fictitious causal connection between the action of the state and the injury of the plaintiff. That the state's inaction may have brought about a trivial increase in the probability that Joshua would be severely injured by his father does not enable a conclusion that the state deprived Joshua of his right to bodily integrity.

The botched rescue must be distinguished from the case where the state places the victim in a situation of high risk, thus markedly increasing the probability of harm and by doing so becoming a cause of the harm. If the state, having arrested a child's parents, leaves the child alone in a situation where he is quite likely to come to grief because no one is watching over him, and he is injured, the state is a cause of the injury. That was *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). This case is different. The Department of Social Services did not place Joshua in his father's custody; a Wyoming juvenile court did that. It is true that three days after temporarily placing Joshua in the custody of the hospital to which he was brought in January 1983, the Department returned him to his father. If in doing so the Department was recklessly placing him in a position of great danger, it might be responsible for what ensued—though to hold that it was would require us to take a step beyond *Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981), where the welfare department placed a child with foster parents and thus retained custodial responsibility. See *id.* at 141. But there is no evidence that the Department was reckless in returning Joshua to the custody of his father

back in January 1983. If at that time the Wisconsin authorities had tried to terminate Randy's parental rights, he might well have sued them under 42 U.S.C. § 1983, charging an unconstitutional deprivation of his rights as a father, as in *Lossman v. Pekarske*, *supra*, where another Wisconsin father suspected of child abuse brought just such a suit; or under state law, relying on such cases as *LaChapell v. Mawhinney*, 66 Wis. 2d 679, 225 N.W.2d 501 (1975), which held that as a general rule a child's best interests are served by living in a parent's home, rather than in the home of a more distant relative or in a foster home. The recklessness in this case came later, when Ann Kemmeter inexplicably failed to act on mounting, and eventually overwhelming, evidence that Joshua was in great peril from his father. And by then Joshua was back in his father's lawful custody. Had Joshua been a foundling in the custody of the state, which then placed him with foster parents whom it knew or strongly suspected would abuse the child, this case would be like *Doe v. New York City Dept. of Social Services*, *supra*, 649 F.2d at 138-40, 142. But he was not.

We reject the proposition embraced by a divided panel of the Third Circuit in *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 510-11 (3d Cir. 1985), that once the state is aware of the danger that a particular child may be abused, a special relationship arises between it and the child and places on the state a constitutional duty to protect the child from the abuse. *Estate of Bailey* (and dicta in *Jensen v. Conrad*, 747 F.2d 185, 190-94 (4th Cir. 1984), where, however, the court found it unnecessary to decide whether the facts established a "special relationship," see *id.* at 195; *id.* at 196 (concurring opinion)) is inconsistent with *Bowers*, *Jackson*, and other cases in this circuit cited earlier. It is also inconsistent with *Estate of Gilmore v. Buckley*, *supra*, which expressly rejected *Estate of Bailey*, in part in reliance on our decisions in *Beard* and *Jackson*. We can find no basis in the language of the due process clauses or the principles of constitutional law for a general doctrine of "special relationship."

See Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. Chi. L. Rev. 1048, 1061 (1986). It is true that there is a "special relationship" between a prison and its inmates which imposes on the prison a constitutional duty (although a severely limited one) to protect an inmate from the violence of his fellow inmates, see, e.g., *Ellsworth v. City of Racine*, 774 F.2d 182, 185 (7th Cir. 1985); what is special, however, is that the prison authorities, having placed the inmate in a position of danger, cannot shrug off all responsibility when the danger materializes and injury results. That analysis has no force in a case such as this, where the victim was in a position of danger by virtue of the decision of authorities in another state to place him in the custody of his father, a decision in which the defendants in this case were not involved. See *Washington v. District of Columbia*, *supra*, 802 F.2d at 1481.

The concept of special relationship, when extended as far as the Third Circuit extended it in *Estate of Bailey*, makes it more costly for a state to provide protective services to an individual in need, since by doing so it may be buying itself a lawsuit should its efforts fail. Moreover, the idea that by once assuming custody of a child a state becomes obligated by federal law to act with some minimum competence in overseeing the child's welfare would inject the federal courts into an area in which they have little knowledge or experience: that of child welfare. Balancing the rights of parents with those of their children is a task as difficult as it is delicate, and we doubt that it will be performed better under the eyes of federal courts administering constitutional law than by the state judicial and administrative authorities. "The federal courts . . . are not local institutions, they do not have staffs of social workers, and there is too little commonality between family law adjudication and the normal responsibilities of federal judges to give them the experience they would need to be able to resolve domestic disputes with skill and sensitivity." *Lloyd v. Loeffler*, 694 F.2d 489, 492 (7th Cir. 1982). To place every state welfare department on the

razor's edge, where if it terminates parental rights it is exposed to a section 1983 suit (as well as a state-law suit) by the parent and if it fails to terminate those rights it is exposed to a section 1983 suit by the child, is unlikely to improve the welfare of American families, and is not grounded in constitutional text or principle.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—2-12-87—450

U.S. Dist. Court East
Dist. Wisc. FILED
June 20 1986
SOFRON B. NEDILSKY
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JOSHUA DeSHANEY, a Minor, by his Guardian ad Litem, Curry First, Esq. and MELODY DeSHANEY,

Plaintiffs

v. Civil Action
No. 85-C-310

RANDY DeSHANEY, WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, WINNEBAGO COUNTY, ANN KEMMETER and CHERYL STELSE,

Defendants.

DECISION AND ORDER

This action is brought by plaintiffs under the common law of negligent and intentional torts and under 42 U.S.C. Sections 1983, 1985 and 1988. The plaintiffs, a mother and her infant son (through his Guardian ad Litem) allege that the child's father, the defendant Randy DeShaney, beat the child repeatedly over many months, causing permanent brain damage, retardation and total disability, and that the other defendants knew of this on-going child-abuse, had both a duty and the legal authority to intervene, but failed to do so in time to prevent debilitating injury to the child.

Presently before the Court is the

motion by the defendants Winnebago County Department of Social Services, Winnebago County, Ann Kemmeter and Cheryl Stelse to dismiss the complaint for failure to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6), and for judgment on the pleadings, Fed.R.Civ.P. 12(c). The parties sought to supplement the pleadings with affidavits, and excerpts from deposition transcripts. Therefore, the Court decided on January 29, 1986, to treat defendant's motion as one for summary judgment. The parties have had the opportunity to file supplementary briefs and affidavits. The defendants' motion is now ready for decision.

FACTS

The plaintiff Joshua DeShaney was born on March 21, 1979. He presently resides in Wisconsin in a foster home for severely handicapped children. Plaintiff Melody DeShaney is an adult resident of Wyoming, and the natural mother of Joshua DeShaney. Melody and defendant Randy DeShaney, Joshua's natural father, were divorced in 1980. Pursuant to the divorce decree Randy DeShaney retained custody of Joshua DeShaney. At all times relevant to this litigation, except for a two or three day period in January 1983, Randy DeShaney had custody and control over his son. On or about March 8, 1984,

Randy DeShaney severely beat Joshua DeShaney. As a result of the beating the child suffered permanent brain damage.

The defendant Ann Kemmeter was at all times relevant to this litigation a social worker employed by the defendant Winnebago County Department of Social Services and the case worker directly responsible for Joshua DeShaney. The defendant Cheryl Stelse was at all times relevant to this litigation a social worker employed by the defendant Winnebago County Department of Social Services. Her responsibilities included assigning and supervising cases and caseworkers and administering federal and state law relevant to child welfare. She

was the immediate supervisor of defendant Ann Kemmeter. The defendant Winnebago County Department of Social Services is an agency of the defendant Winnebago County, which is a municipal corporation of the State of Wisconsin. The Court shall refer to these defendants collectively as the "public defendants" to distinguish them from defendant Randy DeShaney.

On January 27, 1982, the public defendants first received information suggesting that Randy DeShaney abused his son. Winnebago County police forwarded to them a report from Christine DeShaney, another former spouse of Randy DeShaney, that Randy had in the past "hit the boy

cuasing (sic) marks and is a prime case for child abuse." At the time of the report Christine DeShaney was in the process of divorcing Randy DeShaney.

On January 22, 1983, emergency room personnel at the Theda Clark Regional Medical Center in Neenah, Wisconsin, contacted the public defendants after becoming suspicious that Joshua was the victim of child abuse. On that occasion Joshua had been brought in by Marie DeShaney, Joshua's aunt by marriage and Randy DeShaney's "girlfriend". The child had numerous bruises and abrasions over his entire body. Marie DeShaney claimed that Joshua's injuries occurred when another child struck him with a metal toy

truck. Later that day, at the public defendant's request, the Winnebago County Juvenile Court placed Joshua in the temporary custody of the Medical Center.

On January 25, 1983, a "child protective team" meeting was held at the Medical Center. The team consisted of Medical Center personnel, a pediatrician, a psychologist, defendants Ann Kemmeter and Cheryl Stelse, representing the Department of Social Services, an assistant corporate counsel for defendant Winnebago County, and a representative of the Neenah police department.

It was decided at this meeting that there was insufficient evidence of child abuse to bring the case before the

juvenile court. After talking with Randy, Marie and Christine DeShaney, defendant Ann Kemmeter apparently concluded that Randy DeShaney "lacked parenting skills" but was not abusing Joshua. Randy suggested that Marie DeShaney might be abusing Joshua, but Kemmeter thought that unsupervised rough play involving two other children in the household might have produced Joshua's injuries. However, the psychologist recommended several measures designed to protect Joshua and to facilitate monitoring the child's situation, including enrolling him in a Headstart program, providing counselling services for father and son, and encouraging Randy

DeShaney to ask Marie DeShaney, the aunt who brought the child into the Medical Center, to leave the DeShaney household. The public defendants prepared a "social service contract" embodying these recommendations in an effort to secure Randy DeShaney's voluntary cooperation. Proceedings in the juvenile court were terminated and Joshua was returned to his father on January 25, 1983.

Defendant Ann Kemmeter made six visits to the DeShaney home during the six months following the January 22, 1983, incident.

On March 15, 1983, Kemmeter received another report from emergency room personnel that Joshua had been

treated for suspicious injuries possibly produced by child abuse. Kemmeter concluded, however, apparently on the basis of information she received by telephone from the hospital social worker, that there was "no evidence of actual child abuse". Nevertheless, she continued to visit the DeShaney home.

During a visit to the DeShaney household on May 2, 1983, Kemmeter noticed a bump on Joshua's forehead, which the DeShaneys said occurred when Joshua fell from a tricycle. As of July 13, 1983, Kemmeter noted, Marie DeShaney had not moved out of the house and Joshua had not been enrolled in a Headstart program. Kemmeter also noted that

Joshua, who was four years old at the time, was trained to make his bed and prepare his own breakfast every morning. When during a visit to the DeShaney home she remarked that Randy and Marie expected too much from a child of Joshua's age, Randy assured her that Joshua did these things willingly.

Between July 1983 and January 1984 Kemmeter was able to meet with the DeShaney family at home on only one occasion, during which time Kemmeter apparently heard Marie and Randy DeShaney verbally threaten Joshua. On September 21, 1983, when Kemmeter attempted to visit the family, she was told that the couple had taken Joshua to an emergency

room for a scratched cornea. On October 19, 1983, she noticed that Joshua had another bump on the forehead; on November 9, 1983, she noticed Joshua had a "scraped chin" that appeared to her to be a cigarette burn. The City of Oshkosh police responded to complaint calls regarding family violence involving Marie and Randy DeShaney on at least five occasions during the last four months of 1983 and on one occasion in early January of 1984.

On November 30, 1983, Joshua was treated at the emergency room of the Mercy Medical Center in Oshkosh, Wisconsin, for a laceration to his right forehead, a bloody nose, a swollen left

ear and bruises on both shoulders. The adult accompanying Joshua explained that he had fallen in the bathroom and hit his head on the toilet. Two emergency room nurses at the medical center reported to the public defendants following this incident their belief that Joshua was the victim of child abuse.

When Kemmeter visited the DeShaneys on January 18, 1984, she was told she could not see Joshua because he was in bed with the flu.

On March 7, 1984, Kemmeter paid an unannounced visit to the DeShaneys and found Marie and Randy DeShaney decorating a birthday cake for Joshua. Kemmeter noted that the atmosphere in the home

seemed calm despite the fact that Marie had a split lip and swollen nose. The couple mentioned that several days earlier Joshua had fainted in the bathroom for no apparent reason. Kemmeter did not, however, ask to see Joshua.

On March 8, 1984, Joshua Deshaney suffered critical injuries to the brain while being beaten by his father Randy DeShaney. The neurosurgeon who operated on Joshua found extensive evidence of prior traumatic injury to the head. Joshua's body was covered with bruises and lesions of varying age.

LEGAL ANALYSIS

An initial inquiry in a Section

1983 claim is whether the conduct plaintiffs complain of deprived them of a right, privilege, or immunity secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981). The Fourteenth Amendment's concept of liberty does not include the right to basic public services. Jackson v. City of Joliet, 715 F.2d 1200, 1204 (7th Cir. 1983).

> [T]here is no constitutional right to be protected by the state against [crimes committed] by criminals or madmen. it is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services . . .

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)

However, when a municipality puts a particular individual in a position of danger from private persons it creates or assumes a special relationship with such an individual, from which relationship a duty to provide basic protective services may arise. Ellsworth v. City of Racine, 774 F.2d 182, 185 (7th Cir. 1985).

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake

pit.

Bowers v. DeVito, 686 F.2d at 618. Knowledge by a state official that his action or inaction while under a duty to act subjects a particular person to known dangers may amount to gross negligence and subject the official to liability under 42 U.S.C. Section 1983 for the harm which results from such action or inaction. See White v. Rochford, 592 F.2d 381, 385 (7th Cir. 1979).

However, absent the sort of special relationship described above the mere assumption by a municipality of a duty to protect an individual does not give that individual a Section 1983 claim for the negligent performance of that duty, since

Section 1983 "imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." Ellsworth, 774 F.2d at 186 (quoting Baker v. McCollan, 443 U.S. 137, 146 (1979)). A remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Id. From the foregoing one may deduce that a special relationship exists only where the state is under a constitutional duty of care.

The Court knows of no bright line test by which the existence of a special relationship for Section 1983 purposes may be determined. Examples of action by

officials which creates or assumes a special relationship include leaving minor children stranded in an automobile after arresting their guardian, White v. Rochford, 592 F.2d at 382, deliberately exposing mental patients or prison inmates to a known risk of assault, Spence v. Staras, 507 F.2d 554 (7th Cir. 1974), deliberately denying a prisoner needed medical treatment Benson v. Cady, 761 F.2d 335 (7th Cir. 1985), and merely to be present when a fellow police officer begins to beat a person in custody, Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972).

This case is not sufficiently similar to such cases to support a

finding that a special relationship existed between Joshua DeShaney and the public defendants. Neither Joshua nor his father were in state custody either at the time of or immediately prior to the beating. None of the public defendants were present when the beating took place. Nor can the Court say, even after drawing all the inferences to which plaintiffs are entitled, that the public defendants deliberately exposed Joshua to known danger.

Plaintiffs propose that the Court employ a test adopted by the United States Circuit Court of Appeals for the Third Circuit in a factually similar case to determine whether a special

relationship exists here. Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3rd Cir. 1985). Under the proposed test custody of the plaintiff at the time of the injury may not always be a prerequisite to a special relationship. Estate of Bailey, 768 F.2d at 509 (quoting Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984)). Factors to be considered under this test in determining whether a special relationship exists include

> whether the victim or perpetrator was in legal custody at the time of or prior to the incident; whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and whether the state knew of the victim's plight.

Estate of Bailey, 768 F.2d at 509 (citing Jensen v. Conrad, 747 F.2d at 195-96, n. 11). The Court cannot adopt this test because it would provide claims under Section 1983 to plaintiffs whose injuries have little or nothing to do with the arbitrary use of governmental power for purposes of oppression, Davidson v. Cannon, ____ U.S. ____, 106 S.Ct. 668, 670 (1986), claims which recent rulings by the United States Supreme Court appear to preclude, id. (prisoner assaulted by fellow inmate two days after informing prison superintendent of threatened attack has no claim under Section 1983 for prison authorities' merely negligent failure to protect him); Daniels v.

Williams, ____ U.S. ____, 106 S.Ct. 662 (1986) (prisoner injured after slipping on a pillow negligently left on jail stairs has no claim under Section 1983).

In particular, the second factor of the Estate of Bailey test -- whether the state has expressly stated its desire to provide affirmative protection to a particular class cr specific individuals -- is unsound. This factor would favor Section 1983 liability in any case where state officials acted under color of a law containing an expression of legislative intent to protect one or another of the socially or economically deprived classes of our society. Each such law sould give rise to a "special

relationship" of constitutional duty to achieve the legislature's intent as soon as a state official took action with respect to a member of the protected class. Every social welfare program would thus become a charter of constitutionally sanctioned social and economic "rights" which, unlike the civil and political rights traditionally protected by Section 1983, require much more than the restraint of governmental power to guarantee.

However, even were this test to be adopted in this circuit, the Court could not find a special relationship in this case. The first factor weighs too heavily against the existence of such a

relationship since neither the victim nor the perpetrator of this assault had been in state custody at the time of or immediately prior to the March 8, 1984, beating. The fact that the Theda Clark Regional Medical Center held Joshua under a protective custody order for three days some thirteen months prior to the March 1984 beating indicates no more than that efforts were made at that time to protect a child in the legal custody of one of his natural parents from possible child abuse. Such temporary custody more than one year prior to the incident complained of did not give rise to a relationship with the public defendants sufficiently similar to the relationship between the

state and a prisoner incarcerated in one of its penal institutions so as to hold such defendants liable under Section 1983.

The Court finds, therefore, that the public defendants are entitled to judgment as a matter of law on plaintiffs' Section 1983 claims.

The claim for civil rights conspiracy under 42 U.S.C. Section 1985 fair no better because there was no underlying violation of plaintiffs' Section 1983 rights. Moreover, Section 1985 applies only to tortious interference with constitutional rights that is motivated by a racial or other class-based, invidiously discriminatory

animus. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971); Huebschen v. Department of Health and Social Services, 716 F.2d 1167, 1171 (7th Cir. 1983); Briley v. California, 564 F.2d 849 (9th Cir. 1977). There appears to be no evidence of any such animus in this case.

The remaining claims against the public defendants and against Randy DeShaney sound in state tort law. Since no federal questions remain for the Court to decide, it shall relinquish its pendant claim jurisdiction over these state law claims and dismiss them without prejudice. See Duckworth v. Franzen, 780 F.2d 645, 656 (7th Cir. 1985).

ORDER

IT IS THEREFORE ORDERED that the motion of defendants Winnebago County Department of Social Services, Winnebago County, Ann Kemmeter and Cheryl Stelse for summary judgment is granted; judgment shall be entered in favor of said defendants on plaintiffs Joshua DeShaney's and Melody Deshaney's claims under 42 U.S.C. Section 1983 and 1985; plaintiffs' claims against said defendants and against defendant Randy DeShaney under state tort law are dismissed without prejudice.

Dated at Milwaukee, Wisconsin, this 20th day of June, 1986.

BY THE COURT:

/s/ John W. Reynolds
Chief Judge

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JOSHUA DeSHANEY, et al.

v. Docket No. 85-C-310

WINNEBAGO COUNTY, et al.

NAME OF JUDGE OR MAGISTRATE:
John W. Reynolds

Decision by Court. This action came to consideration before the Court with the judge (magistrate) named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

---

that the motion to dismiss of defendants State of Wisconsin, Wisconsin Department of Health and Social Services, and Linda Reivitz is GRANTED.

IT IS FURTHER ORDERED AND ADJUDGED that the motion for summary judgment of

defendants Winnebago County Department of Social Services, Winnebago County, Ann Kemmeter and Cheryl Stelse is GRANTED as to plaintiffs' claims under 42 U.S.C. Sections 1983 and 1985.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' claims under state tort law against said defendants and defendant Randy DeShaney are DISMISSED WITHOUT PREJUDICE.

Date: 6/20/86

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, IL 60604

February 12, 1987

BEFORE

Hon. Richard A. Posner, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

JOSHUA DeSHANEY, a Minor, by his Guardian ad Litem, Curry First, Esq., and MELODY DeSHANEY,
Plaintiffs-Appellants

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, et al.
Defendants-Appellees.

No. 86-2188

Appeal from the United States District Court for the Eastern District of Wisconsin
No. 85 C 310

Judge John W. Reynolds

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

_____

*Hon. Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

April 21, 1987

BEFORE

Hon. Richard A. Posner, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

JOSHUA DeSHANEY, a minor,
by his guardian ad litem, Curry First, Esq., and MELODY-DeSHANEY,
Plaintiffs-Appellants,

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, et al.
Defendants-Appellees

No. 86-2188

Appeal from the United States District Court for the Eastern Distrct of Wisconsin, Milwaukee, Division.

No. 85 C 310
John W. Reynolds, Judge.

ORDER

On February 25, 1987, plaintiffs-appellants filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

*Hon. Robert A. Grant of the Northern District of Indiana, sitting by designation.

Supreme Court, U.S.
FILED
AUG 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 87-154

IN THE UNITED STATES SUPREME COURT

OCTOBER, 1987 TERM

JOSHUA DESHANEY, a Minor, by his Guardian ad Litem, and MELODY DESHANEY,

Petitioners (Plaintiffs)

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, WINNEBAGO COUNTY, ANN KEMMETER and CHERYL STELSE,

Respondents (Defendants).

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Mark J. Mingo, Esq.
Wayne M. Yankala, Esq.
611 N. Broadway
Milwaukee, WI 53202
(414) 273-7400

Attorneys of Record
for Respondents-
Defendants

28pp

QUESTIONS PRESENTED FOR REVIEW

Petitioners set forth three questions in their Petition for Writ of Certiorari. All three in effect address the same identical issue: Whether respondents' conduct was so egreious as to trigger the protection of the due process clause. The flaw in petitioners' presentation is that it overlooks the fact that the Seventh Circuit Court of Appeals made this assumption in their decision.

> We may assume that the failure of the Winnebago Department of Social Services to protect Joshua from his father was a sufficiently aggravated form of negligence to escape the bar of Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 665, 667, 88 L.Ed.2d 662 (1986) and Davidson v. Cannon, 464 U.S. 344, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986), which hold that simple negligence does not violate Section 1983.

DeShaney v. Winnebago County Dept. of Social Services, 812 F.2d 298, 302 (7th Cir. 1987).

It is respectfully suggested that the issues

as framed herein by respondents encompass the grounds for the Seventh Circuit's dismissal and as such represent the only true issues properly before this Court.

1. Whether the Fourteenth Amendment's concept of liberty affords individuals the right to basic protective services?

2. Whether a "special relationship" arose between the Department of Social Services and Joshua DeShaney thereby creating a constitutional duty on behalf of the Department to protect Joshua from abuse by a third party.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	1
Summary of Argument	5
Argument	6
I. The Decisions of the Courts of Appeal on this Issue are not in Conflict as a Result of the Decision in the Court Below	6
II. This Case does not Present this Court with the Opportunity to Resolve the Question left open by Daniels	13
III. Granting Petitioners' Passioned Plea for a Ruling in Their Favor Would in Turn Open the Federal Courts to Lawsuits Where There has been no Affirmative Abuse of Power	15
Conclusion	19
Entry of Appearance	20
Certificate of Service	21

TABLE OF AUTHORITIES

Cases	Page
Baker v. McCollan, 443 U.S. 137, 146-47 (1979)	8
Beard v. O'Neal, 728 F.2d 894 (7th Cir. 1984)	9
Bradberry v. Pinellas County, 789 F.2d 1513 (11th Cir. 1986) ..	9
Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 665, 667, 88 L.Ed.2d 662 (1986) .	i,5,10,11,12, 13,14,15
Davidson v. Cannon, 464 U.S. 344, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986)	i,5,10,11,12, 13,14
DeShaney v. Winnebago County Dept. of Social Services, 812 F.2d 298, 302 (7th Cir. 1987)	i,7,9,12,17
Doe v. New York City Dept. of Social Services, 649 F.2d 139 (2d Cir. 1981)	6,9,12
Ellsworth v. City of Racine, 774 F.2d 182 (7th Cir. 1985)	9
Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3rd Cir. 1985)	6,9,10,11,12
Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir. 1986)	9

TABLE OF AUTHORITIES

Cont.	Page
Griffin v. Illinois, 351 U.S. 12 (1956)	9
Jackson v. Byrne, 738 F.2d 1443, 1446 (7th Cir. 1984)	8,9
Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1984) ...	9,16
Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984) Cert. Denied ____ U.S. ____ 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985)	6,9,12
Parratt v. Taylor, 451 U.S. 527, 535 (1981)	8
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	9
Walker v. Rowe, 791 F.2d 507 (7th Cir. 1986)	9
Washington v. District of Columbia, 802 F.2d 1478 (D.C. Cir. 1986) ..	9

MISCELLANEOUS AUTHORITIES

	Page
Supreme Court Rule 28(5)(b)	20
Supreme Court Rule 34(.2)	1
U.S. Const. amend. XIV	5,8,15,18
42 U.S.C. Section 1983	5,6,7,11,13, 17

STATEMENT OF THE CASE

Since the statement set forth by the petitioners is replete with inaccurate and inflamatory argument asserted to gain the sympathy of the Court, respondents find it necessary to resort to Supreme Court Rule 34(.2) and in turn set forth certain facts which were omitted or inaccurately stated by petitioners.

In 1979 the principal petitioner, Joshua DeShaney, was born in Wyoming, the son of Melody and Randy DeShaney. In 1980 a Wyoming Court granted the DeShaneys a divorce awarding custody of Joshua to his father. Shortly thereafter, Randy DeShaney moved with Joshua to Wisconsin. Randy DeShaney remarried a woman by the name of Christine.

Respondent, Ann Kemmeter, a social worker serving the DeShaney family, first came in contact with Joshua DeShaney on January 22, 1983. Joshua

was brought to the Theda Clark Regional Medical Center in Neenah, Wisconsin and examined by Dr. Gehringer, a pediatrician, for possible child abuse.

Later that day, at the request of respondents, the Winnebago County Juvenile Court placed Joshua in the temporary custody of the medical center.

On January 25, 1983, a "child protective team" meeting was held at the medical center. The team consisted of medical center personnel, a psychologist, a pediatrician, respondents Ann Kemmeter and Cheryl Stelse -- representing the Department of Social Services -- a representative of the Neenah Police Department, and an assistant corporate counsel for respondent, Winnebago County.

At the January 25, 1983 team meeting, Joshua's condition was discussed in detail and the assistant corporation counsel charged with commencing Court actions in cases of suspected child

abuse, indicated that there was insufficient evidence to retain Joshua in the custody of the Court.

As a result of the investigation and team meeting, respondents filed a report with the State of Wisconsin stating that the report of suspected child abuse was "unfounded". Upon the recommendation of the "child protective team" Joshua was released to his father from the temporary custody of Theda Clark Hospital.

On February 14, 1983 the Winnebago County Juvenile Intake Court closed the child-protection case that had been brought by the respondents and at all times thereafter the involvement of the respondents with the DeShaney family was on a voluntary basis in a "family services" context.

Between February 14, 1983 and March 8, 1984 Kemmeter continued to work with the DeShaney family on a voluntary family services basis; focusing on proper parenting, disciplinary techniques and

in addition observing the children in the family setting when the circumstances permitted.

At no time after the January 25, 1983 team meeting and prior to March 8, 1984 did Kemmeter or Stelse ever feel that there was sufficient evidence or facts pertaining to Joshua DeShaney to take the matter to the assistant corporation counsel for a referral into Court for the removal of the child from the home. Likewise, the assistant corporation counsel, charged with filing a petition under Chapter 48 of the Wisconsin Statutes seeking jurisdiction in cases involving children alleged to be in need of protective services, at no time believed that there were sufficient facts presented to respondents for purposes of pursuing the matter in Juvenile Court.

SUMMARY OF APGUMENT

Petitioners seek to expand the constitution whereby the Fourteenth Amendment would afford individuals the right to basic protective services once a state agency becomes aware of the fact that an individual is exposed to some danger. This proposal runs contrary to well-established principles of constitutional law, conflicts with the decisions of Daniels v. Williams, 474 U.S. 327 (1986) and Davidson v. Cannon, 474 U.S. 344 (1986), and in turn would open the Federal Courts to lawsuits based on Section 1983 even though there has been no affirmative abuse of power and no "special relationship" established.

ARGUMENT

I.

THE DECISIONS OF THE COURTS OF APPEAL ON THIS ISSUE ARE NOT IN CONFLICT AS A RESULT OF THE DECISION IN THE COURT BELOW

Petitioners maintain that a conflict now exists amongst the Federal Courts of Appeal as a result of the Seventh Circuit's Decision. Petitioners argue that Doe v. New York City Dept. of Social Services, 649 F.2d 139 (2d. Cir. 1981); Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3rd Cir. 1985); and Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), Cert. Denied, ____ U.S. ____, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985) all stand for the proposition that "the aggravated misconduct of public officials in failing to protect a particular child whom they knew to be in serious physical danger . . . does constitute an actionable wrong under 42 U.S.C. 1983". Petition for Writ of Certiorari, at

27-28. In contrast, petitioners claim . . .

> the Court below ruled that even aggravated misconduct (such as it found to exist in this case) could not, as a matter of law, give rise to enforceable rights under Section 1983. In effect it ruled that the only actionable misconduct in such cases would be where the public official physically commits the assault, and that to stand by and allow another to commit the act, despite overwhelming awareness of the impending danger to the child, is of no legal significance. Id. at 28-29.

Petitioners are incorrect in their understanding of the Seventh Circuit's Decision.

A closer reading of DeShaney v. Winnebago County Dept. of Social Services, 812 F.2d 298 (7th Cir. 1987) reflects that the decision is based on well-founded principles of law and is therefore consistent with the law of other circuits.

A basic premise of constitutional law is that before "an omission that leads to a death [or

injury] is actionable under the Fourteenth Amendment and Section 1983, the constitution must recognize an underlying duty on the part of the state [agency] to act". Jackson v. Byrne, 738 F.2d 1443, 1446 (7th Cir. 1984). In other words, a constitutional tort actionable under Section 1983 requires a deprivation of a right, privilege or immunity secured by the constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981); Baker v. McCollan, 443 U.S. 137, 146-47 (1979).

As both Judge Posner -- writing for the Seventh Circuit Court of Appeals -- and Judge Reynolds -- writing for the United States District Court for the Eastern District of Wisconsin -- aptly indicate at the onset of their opinions, the Fourteenth Amendment's concept of liberty does not afford individuals the right to basic protective services. This principle represents a traditional conception of the due process clause.

See San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Griffin v. Illinois, 351 U.S. 12 (1956); Walker v. Rowe, 791 F.2d 507 (7th Cir. 1986); Ellsworth v. City of Racine, 774 F.2d 182 (7th Cir. 1985); Beard v. O'Neal, 728 F.2d 894 (7th Cir. 1984); Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983); Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir. 1986); Bradberry v. Pinellas County, 789 F.2d 1513 (11th Cir. 1986); Washington v. District of Columbia, 802 F.2d 1478 (D.C. Cir. 1986).

This conception arises from the view that the constitution . . .

> is a charter of negative liberties; it tells the [government] to let people alone; it does not require the Federal Government or the state to provide services, even so elementary a service as maintaining law and order.

Jackson v. Byrne, 738 F.2d at 1446 (quoting Beard v. O'Neal, 728 F.2d at 894).

Consistent with the decisions of Doe, Bailey, and Jensen, DeShaney recognizes an

exception to the above constitutional principle. When a municipality or other governmental entity affirmatively "places the victim in a situation of high risk" it may assume a special relationship with such an individual, from which relationship a duty to provide basic protective services may arise.

> It is true that there is a "special relationship" between a prison and its inmates which imposes on the prison a constitutional duty (although a severely limited one) to protect an inmate from the violence of his fellow inmates. (citation omitted) What is special, however, is that the prison authorities, having placed the inmate in a position of danger, cannot shrug off all responsibility when the danger materializes and injury results.

812 F.2d at 303-04 (Emphasis Added).

If a conflict does exist, it exists between Bailey and the decisions of Daniels v. Williams, 474 U.S. 327 (1986), and Davidson v. Cannon, 474 U.S. 344 (1986).

Bailey sets forth the following factors to

consider in determining whether a "special relationship" exists.

> Whether the victim or perpetrator was in legal custody at the time of or prior to the incident; whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individual; and whether the state knew of the victim's plight.

768 F.2d at 509.

As Judge Reynolds noted, the adoption of this test would run contrary to the decisions of Davidson and Daniels wherein this Court made it clear that Section 1983 is to be invoked only where there has been some affirmative abuse of governmental power. An adoption of the Bailey test would . . .

> provide claims under Section 1983 to plaintiffs whose injuries have little or nothing to do with the arbitrary use of governmental power for purposes of oppression (citation omitted) claims which recent rulings by the United States Supreme Court appear to preclude . . . (citation omitted)[.]

In particular, the second factor of the Estate of Bailey test -- whether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals -- is unsound. This factor would favor Section 1983 liability in a case where state officials acted under color of a law containing an expression of legislative intent to protect one or another of the socially or economically deprived classes of our society. Each such law would give rise to a "special relationship" of constitutional duty to achieve the legislature's intent as soon as a state official took action with respect to a member of the protected class. Every social welfare program would thus become a charter of constitutionally sanctioned social and economic "rights" which, unlike the civil and political rights traditionally protected by Section 1983, require much more than the restraint of governmental power to guarantee.

Decision and Order, (June 20, 1986), at 9-11, (R.65) (Pet. App. at 69-71).

If a conflict exists, it is not between Doe, Jensen, Bailey and DeShaney, but rather between Bailey and the decisions of Davidson and Daniels.

II.

THIS CASE DOES NOT PRESENT THIS COURT WITH THE OPPORTUNITY TO RESOLVE THE QUESTION LEFT OPEN BY DANIELS

Although the question of "whether something less than intentional conduct, such as recklessness or 'gross negligence', is enough to trigger the protection of the due process clause" remains to be answered by this Court, this is not the appropriate case to resolve the question . See Daniels, 106 S.Ct. 662, 667, n. 3.

The Seventh Circuit assumed that both Daniels and Davidson would not be a bar to petitioners' action.

> We may assume without having to decide that the failure of the Winnebago Department of Social Services to protect Joshua from his father was a sufficiently aggravated form of negligence to escape the bar of Daniels . . . and Davidson . . . which hold that simple negligence does not violate Section 1983.

812 F.2d at 302.

Thus, petitioners seek the granting of a Writ of Certiorari based on an issue which was not dispositive in the Lower Court.

Whether the respondents' conduct rose to a level whereby it would escape the bar of Daniels and Davidson is not the focal point of this case. Rather, before this issue can even be addressed, first and foremost the question becomes whether the respondents had a duty to act in the first instance.

Since the true issue is whether there existed an underlying duty, recognized by the constitution, on the part of the respondents to act, this case does not provide this Court with the opportunity to resolve the question left open by Daniels.

III.

GRANTING PETITIONERS' PASSIONED PLEA FOR A RULING IN THEIR FAVOR WOULD IN TURN OPEN THE FEDERAL COURTS TO LAWSUITS WHERE THERE HAS BEEN NO AFFIRMATIVE ABUSE OF POWER

In part three of their argument, petitioners argue that a ruling in their favor "would be of major significance to every child protection agency in the nation". Petition for Writ of Certiorari, at 32. In effect, every agency would definitively know "how assertive they must be in intervening to protect an endangered child". Id. at 33.

Respondents agree that a ruling in petitioners' favor would be of major significance, but of a negative consequence.

The constitution would be expanded. See Daniels, 106 S.Ct. at 665. The Fourteenth Amendments' concept of liberty would in turn afford all individuals the right to basic protective services once any state agency, whether it is a police

department, fire department, or child protection department, became aware of the fact that an individual was exposed to some danger. To adopt petitioners' proposal . . .

> would be more than an extension of traditional conceptions of the due process clause. It would turn the clause on its head. It would change it from a protection against coercion by state government to a command that the state use its taxing power to coerce some of its citizens to provide services to others.

Jackson v. City of Joliet, 715 F.2d at 1204.

> A socially undesireable chilling effect would arise whenever a state would confront the occasion to provide protective services to individuals in need because by doing so states would be buying themselves lawsuits if their efforts failed.

> Moreover, the proposition that by once assuming custody of a child a state becomes obligated by federal law to act with some minimum competence in overseeing the child's welfare would if accepted inject the Federal Courts into an

> area in which they have little knowledge or experience: that of child welfare. Balancing the rights of parents with those of their children is a task as difficult as it is delicate, and we doubt that it will be performed better under the eyes of Federal Courts administering constitutional law than by the State Judicial Administrative authority. . . . To place every state welfare department on the razor's edge, where if it terminates parental rights it is exposed to a Section 1983 suit (as well as a state-lawsuit) by the parent and if it fails to terminate those rights it is exposed to a Section 1983 suit by the child, is unlikely to improve the welfare of American families, and is not grounded in constitutional text or principal.

DeShaney, 812 F.2d at 304.

Contrary to petitioners' sympathetic plea, a decision from this Court would not give child protective agencies constructive guidance in determining when they must intervene in a child abuse situation. Agencies would be placed in a position of either becoming a guarantor of the safety of each child the agency would make con-

tact with or, in the alternative, the agency would be forced simply to refuse to offer voluntary assistance to such families for fear of subjecting itself to charges of constitutional deprivation in violation of Section 1983. Neither the Fourteenth Amendment or Section 1983 were meant to be invoked in such an imaginitive fashion.

Furthermore, a decision from this Court will not give child protection agencies guidance in determining "how far they may go in turning a blind eye to a child's plight". Petition for Writ of Certiorari, at 33. For petitioners and other parties similarily situated are not without recourse since there are ample remedies available in State Courts under common law tort principals.

CONCLUSION

For the foregoing reasons, respondents submit that this Court should deny petitioners' Writ of Certiorari.

Dated this 25th day of August, 1987.

WINNEBAGO COUNTY DEPARTMENT
OF SOCIAL SERVICES, et al.,
Respondents

By: _____
MARK J. MINGO, Esq.

By: _____
WAYNE M. YANKALA, Esq.

P.O. ADDRESS:
611 N. Broadway
Milwaukee, WI 53202
(414) 273-7400

ENTRY OF APPEARANCE

TO: Clerk of the United States Supreme Court

NOTICE IS HEREBY GIVEN, pursuant to Supreme Court Rule 28(5)(b), that the undersigned, members of the Bar of the Supreme Court of the United States, will appear as counsel for Winnebago County Department of Social Services, Winnebago County, Ann Kemmeter and Cheryl Stelse, Respondents, in the above-entitled action.

Dated: August 21, 1987.

MARK J. MINGO
611 North Broadway
Milwaukee, WI 53202
(414) 273-7400

WAYNE M. YANKALA
611 North Broadway
Milwaukee, WI 53202
(414) 273-7400

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 25th day of August, 1987, a true and accurate copy of the Respondents' Brief in Opposition to Petition for Writ of Certiorari was deposited in the United States mail, postage prepaid, addressed to:

Donald J. Sullivan, Esq.
P.O. Box 1854
Cheyenne, WY 82003

John Possi, Esq.
P.O. Box 1807
Madison, WI 53701

Curry First, Esq.
1219 North Cass Street
Milwaukee, WI 53202

Patrick R. Russell, Esq.
741 North Milwaukee Street
Milwaukee, WI 53202

WAYNE M. YANKALA

Supreme Court, U.S.
FILED
JUN 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

(12)

No. 87-154

In The
Supreme Court of the United States
October Term, 1987

JOSHUA DeSHANEY, a Minor, by his Guardian ad litem, and MELODY DeSHANEY,

Petitioners,

vs.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES; WINNEBAGO COUNTY; ANN KEMMETER and CHERYL STELSE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

Donald J. Sullivan
Counsel of Record
Law Offices of Donald J. Sullivan P.C.
1815 Evans Avenue
Cheyenne WY 82003-1854
(307) 634-0112
Curry First
1204 West Wisconsin Ave.
Milwaukee WI 53233
Attorneys for Petitioners

Mark J. Mingo
Counsel of Record
Wayne Yankala
Simarski & Stack, Ltd.
611 North Broadway
Milwaukee WI 53202
(414) 273-7400

Attorneys for Respondents

Petition for Writ of Certiorari Filed July 17, 1987.
Certiorari Granted March 21, 1988.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

203 P

TABLE OF CONTENTS

	Page
Relevant District Court Docket Entries	1
Complaint	2
Answer	18
Motion to Dismiss	30
Affidavit of Mark J. Mingo, Esq., with Attachments	32
Order to Treat Motion to Dismiss as Motion for Summary Judgment	86
Affidavit of Cheryl Stelse	87
Affidavit of John Bodnar	92
Affidavit of Ann Kemmeter	95
Attachments to Plaintiffs' Reply Brief	101
Affidavit of Wayne Yankala, Esq., with Attachments	161
Decision and Order Granting Summary Judgment	Cert. Petition 47-75
Judgment	Cert. Petition 76-77
Opinion of the Seventh Circuit Affirming the Holding of the District Court	Cert. Petition 36-46
Order of the Seventh Circuit Affirming the Holding of the District Court	Cert. Petition 78-79
Order of the Seventh Circuit Denying Rehearing	Cert. Petition 80-81

RELEVANT DOCKET ENTRIES

Date	NR.	Proceedings
3/ 4/85	1	COMPLAINT, Summons issued
3/29/85	3	Defts ANSWER
10/23/85	27	Winnebago County defts' motion for failure to state a claim and/or for judgment on the pleadings. D1-DISM/SUM JM
6/20/86	65	DECISION & ORDER(JWR) that the Motion of Defts Winnebago County Dept of Social Services, Winnebago County, Ann Kemmeter & Cheryl Stelse for Summary Judgment is Granted. Judgment shall be entered in favor of said Defts on Plaintiffs Joshua DeShaney's & Melody DeShaney's claims Pltfs claims against said Defts & against Deft Randy DeShaney under state tort are Dismissed w/o prejudice. EOD 6/23/86.
6/20/86	66	JUDGMENT (signed by Deputy Clerk) per above Order. EOD 6/23/86.
7/18/86	67	Pltf's Notice of Appeal to the 7th Circuit from order entered on 6/20/86. Short record mailed to 7th Circuit, copies to all parties.
5/ 4/87	73	CERTIFIED COPY of Order from the Seventh Circuit Court of Appeals that the Judgment of said DISTRICT Court in this cause appealed be & the same is hereby AFFIRMED, w/costs, in accordance w/ the opinion of this Court filed this date. w/ slip opinion. Contents returned 2 vols pleadings, 1 volume loose pleadings #43.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOSHUA DESHANEY, a Minor,
By His Guardian Ad Litem
Curry First, Esq.,
1219 North Cass Street,
Milwaukee, Wisconsin 53202

and

MELODY DESHANEY,
2950½ Plum Drive
Cheyenne, Wyoming 82001,

Plaintiffs, Case No. ———

vs.

WINNEBAGO COUNTY DEPARTMENT
OF SOCIAL SERVICES,
448 Algoma Blvd.
Oshkosh, Wisconsin 54901 COMPLAINT

and

WINNEBAGO COUNTY
Winnebago County Courthouse
415 Jackson Drive
Oshkosh, Wisconsin 54901

and

THE STATE OF WISCONSIN
State Capitol
Madison, Wisconsin

and

WISCONSIN DEPARMENT OF
HEALTH AND SOCIAL SERVICES
1 West Wilson Street
Madison, Wisconsin

and

LINDA RIVETZ, Individually and
as Secretary of the Wisconsin
Department of Health and
Social Services
1 West Wilson Street
Madison, Wisconsin

and

ANN KEMMETER, Individually and as
Director of Protective Services,
Winnebago County Department of
Social Services
448 Algoma Blvd.
Oshkosh, Wisconsin 54901

and

CHERYL STELSE, Individually and as
Director of Protective Services,
Winnebago County Department of
Social Services
448 Algoma Blvd.
Oshkosh, Wisconsin 54901

and

RANDY DESHANEY
1820 Chain Drive, Apt. 6
Menasha, Wisconsin,

Defendants.

Plaintiffs, complaining against Defendants, allege as follows:

FIRST CAUSE OF ACTION

1. This is an action for compensatory and punitive damages, and arises under the Due Process and Equal Protection clauses of the United States Constitution. This action, and the relief sought, are authorized by Title 42,

United States Code, Sections 1983, 1985 and 1988, and by the Due Process and Equal Protection clauses of the United States Constitution.

2. Plaintiff Joshua DeShaney is an infant and minor, and is a citizen of the United States. He presently resides in foster home placement provided for severely handicapped children in the State of Wisconsin. He is represented by his guardian ad litem and attorney, Curry First, Esq., who is an attorney duly licensed to practice law in the State of Wisconsin and in the United States District Court for the Eastern District of Wisconsin.

3. Plaintiff Melody DeShaney is an adult citizen of the United States and of the State of Wyoming, and is the natural mother of the Plaintiff Joshua DeShaney. She resides at 2950½ Plum Drive, Cheyenne, Wyoming 82001.

4. Defendant Winnebago County Department of Social Services is an agency of Winnebago County, a municipal corporation in the State of Wisconsin, and is located at 448 Algoma Blvd, Oshkosh, Wisconsin.

5. Defendant Winnebago County is a municipal corporation in the State of Wisconsin, organized and existing pursuant to the laws of said State.

6. Defendant State of Wisconsin is a public entity organized as a state and is one of the United States.

7. Defendant Wisconsin Department of Health and Social Services is a state agency of the State of Wisconsin, with offices located at 1 Wilson Street, Madison, Wisconsin.

8. Defendant Linda Rivetz at all relevant times is and was Secretary of the Wisconsin Department of Health and Social Services.

9. Defendant Ann Kemmeter was a social worker for Winnebago County Department of Social Services, with offices located at 211 North Commercial Street, Neenah, Wisconsin, and was the social worker directly responsible for the infant Plaintiff Joshua DeShaney.

10. Defendant Cheryl Stelse was a social worker supervising the child protective services and activities of the Winnebago County Department of Social Services. Her responsibilities included assigning and supervising cases and caseworkers and administering federal and state law and policy relating to child protective services. She was responsible for overseeing the care of the infant Plaintiff Joshua DeShaney.

11. Randy DeShaney is an adult citizen of the State of Wisconsin and is the natural father of the infant Plaintiff Joshua DeShaney.

12. Defendant Winnebago County and Defendant State of Wisconsin are herein being sued in their corporate capacities. Defendants Winnebago County Department of Social Services and Wisconsin Department of Health and Social Services are herein being sued as agencies of the County and the State, respectively. The individual defendants Linda Rivetz, Ann Kemmeter and Cheryl Stelse are herein being sued both individually and in their official capacities.

13. Defendant Randy DeShaney is herein being sued individually.

14. For clarity, Defendants Winnebago County, Winnebago County Department of Social Services, State of Wisconsin, Wisconsin Department of Health and Social

Services, Linda Rivetz, Ann Kemmeter and Cheryl Stelse will hereinafter, wherever appropriate, be referred to collectively as "the Public Defendants," to contradistinguish them from the private individual defendant Randy DeShaney.

15. On July 5, 1984, a Notice of Injury and Claim was made pursuant to Wis. Stats., Sec. 893.80, on behalf of Joshua DeShaney by his then guardian ad litem, George W. Curtis, Esq., and on behalf of Melody DeShaney, upon Defendants Winnebago County, Winnebago County Department of Social Services, and Ann Kemmeter. A Notice of Disallowance thereof was mailed to said guardian ad litem on September 4, 1984.

16. At relevant times to and until March 8, 1984, Joshua DeShaney was in the custody and control of Defendant Randy DeShaney.

17. During the time period in question Randy DeShaney repeatedly battered, assaulted and abused Joshua DeShaney, physically, and emotionally.

18. In 1982 or 1983 Chris DeShaney, the spouse of Randy DeShaney, reported to the Defendants the fact of the ongoing child abuse described above.

19. On or about November 30, 1983, Dr. T.L. Bowers, M.D., reported to the Public Defendants his diagnosis of child abuse of Joshua DeShaney, which Dr. Bowers had made in connection with his examination of the child at the Emergency Room of a local hospital.

20. The Oshkosh Police Department responded to complaint calls of family violence by Randy DeShaney on repeated occasions throughout the time period in question, including without limitation September 23, 1983; November 11, 1983; November 12, 1983; November 24, 1983; November 27, 1983; and January 4, 1984.

21. During the time period in question the minor child, Joshua DeShaney, was on multiple occasions taken to hospital emergency rooms for emergency medical care of various complaints including without limitation abrasions and lacerations on many parts of his body, usually accompanied by explanations that the child had fallen down the stairs.

22. The Public Defendants, and each of them, knew or by the exercise of even slight care reasonably should have known of the foregoing facts and circumstances and particularly of the strong likelihood and great danger of child abuse being committed upon Joshua DeShaney.

23. At all relevant times the Public Defendants and each of them had the duty, responsibility and authority under applicable law to supervise, monitor, oversee and promote the care, welfare, safety and wellbeing of Joshua DeShaney.

24. The Public Defendants and each of them actually undertook to supervise, monitor, oversee and promote the care, welfare, safety and wellbeing of Joshua DeShaney.

25. The Public Defendants, and each of them, caused Joshua DeShaney to be removed from the custody of Randy DeShaney by reason of the foregoing facts and circumstances, and particularly the child abuse being committed to and upon Joshua DeShaney, and caused him to be placed in protective placement.

26. The Public Defendants, and each of them, subsequently caused and permitted Joshua DeShaney to be taken out of protective placement and returned to the custody of Randy DeShaney.

27. The Public Defendants, and each of them, actively concealed and withheld from Plaintiff Melody DeShaney all knowledge and information concerning (1) the evidence and indications of child abuse upon her son Joshua DeShaney, (2) the removal of Joshua from the father's custody, (3) the return of Joshua to the father's custody, (4) the whereabouts of Joshua at any relevant time, and (5) the danger to Joshua of ongoing, continuing child abuse both presently and prospectively.

28. Plaintiff Melody DeShaney paid monthly child support for the care and maintenance of Joshua DeShaney, pursuant to a stipulation made in litigation initiated by the Public Defendants, wherein they demanded that she make such child support payments to them.

29. The Public Defendants actually knew the location, address and telephone number of Plaintiff Melody DeShaney at all relevant times.

30. Plaintiff Melody DeShaney would promptly have sought and obtained a formal legal change of the custody of Joshua back to herself had she known or been informed of the status or condition of Joshua, and she did not do so because Defendants withheld the above-described matters from her.

31. The child abuse being committed upon Joshua DeShaney continued throughout the entire period of time he was in the custody of Randy DeShaney, during all of

which time period the Defendants, and each of them, were under a legal duty and obligation to protect him and provide and promote his welfare and wellbeing.

32. On or about March 7, 1984, Defendant Ann Kemmeter made a surprise visit to the Randy DeShaney home for the purpose of checking the condition of Joshua DeShaney.

33. At such time she was told by Randy DeShaney that Joshua had "the flu," and that Randy DeShaney preferred that Joshua not be disturbed.

34. Defendant Ann Kemmeter thereupon departed, without seeing Joshua or determining his condition.

35. On or about March 7, 1983 [sic], either before or after the visit described immediately above, Defendant Randy DeShaney brutally battered, assaulted and abused Joshua DeShaney.

36. On March 8, 1984, Joshua DeShaney was taken to a local hospital by Randy DeShaney, where he was seen to be profoundly injured, having suffered multiple abrasions, lacerations, edemas, ecchymoses, skull fractures, brain damage and diverse other physical, mental and emotional injury.

37. The Defendants, and each of them, failed and omitted properly to supervise, protect, and provide and promote the welfare of Joshua DeShaney.

38. The Defendant Winnebago County and the Defendant Winnebago County Department of Social Services promulgated and followed policies and practices in

violation of applicable federal and state laws, and failed to establish specific and written policies and practices despite the statutory duty to establish and follow the same, but rather abandoned these responsibilities and delegated the policy-making and decision-making functions to the individual defendants herein.

39. The Defendant Wisconsin Department of Health and Social Services failed to discover, report, give notice of and correct the said failures of the Winnebago County Department of Social Services, despite its duty to do so, despite its performance of periodic reviews and audits of said Department, and despite its obligations under federal and state law.

40. At all relevant times the policy, custom and practice of the Defendants Winnebago County, Winnebago County Department of Social Services, Wisconsin Department of Health and Social Services, and the State of Wisconsin were to delegate to the individual defendants herein, and each of them, the authority, power, right and responsibility to make decisions and take actions for and on behalf of the said public entities, both with respect to individual welfare and child protection cases and with respect to general welfare and child protection matters.

41. The said public defendants, and each of them, did in fact delegate to the individual defendants herein, and each of them, such authority, power, right and responsibility as described immediately above.

42. The said public defendants, and each of them, authorized, approved, ratified, condoned and adopted the decisions, actions and omissions of the individual defendants herein, and each of them, and made and constituted such decisions, actions and omissions of the individual defendants herein, and each of them, as their own.

43. The policies, decisions, actions and omissions of the Public Defendants herein, and each of them, violated the accepted standards of good practice in the fields of social work and child protection, and violated applicable federal and state statutes, laws and regulations.

44. The policies, decisions, actions and omissions of the Public Defendants were made and taken knowingly, intentionally, carelessly, negligently, willfully, recklessly, and with indifference to and disregard of the known dangers to Joshua DeShaney and of the civi rights of both Plaintiffs herein.

45. The policies, decisions, actions and omissions of the Public Defendants, and each of them, were not taken in good faith, but rather were taken under the circumstances described immediately above and were, by both subjective and objective norms, taken not in good faith.

46. Each and all of the policies, decisions, actions and omissions of the Public Defendants herein, and each of them, were made and taken under and pursuant to the color of state law, including without limitation Sec. 48.891 Wis. Stats., 1981-1982.

47. The acts and omissions of the individual defendants Rivetz, Kemmeter and Stelse were committed by them, and each of them, while acting in the scope of their employment and carrying out their duties as an officer or employee of their respective public entity employers.

48. As a direct and proximate result of the foregoing facts and circumstances, the civil rights of Joshua DeShaney have been violated, and he has been utterly deprived of his civil rights, including without limitation his right to ordered liberty; his right to freedom from physcal attack and abuse; his right to personal safety, health and security in his person; his right to live and to exist; his right to live and exist as a normal human being; his right to a family or child-parent relationship with his mother and the other members of his extended family; his right to privacy; his right to engage in the common activities and occupations of life; his right to grow and develop; his right to maintain personal relationships, to marry and to have children; his right to freedom from bodily restraint; his right to contract; his right to learn, become educated according to his abilities and acquire wisdom and knowledge; his right to live in a place and manner of his choosing; his right to hearings, notice, confrontation, representation and the due process of law; his rights and privileges under the common law; and other and diverse rights and privileges, all as secured by the Constitution of the United States, and particularly the First, Fourth, Fifth, Eighth and Fourteenth Amendments thereto, and by the provisions of 42 United States Code 1983, 1985 and 1988.

49. As a direct and proximate result of the foregoing facts and circumstances, the civil rights of Plaintiff Melody DeShaney have been violated and she has been deprived of her civil rights, including without limitation her right to maintain her parent-child relationship with her son, Joshua DeShaney, and her right to do so in a

normal manner; her right to establish, reestablish and maintain a family relationship with Joshua DeShaney; her right to communicate with her son Joshua DeShaney; her right to hearings, notice, confrontation, representation and the due process of law; her rights and privileges under the common law; and other and diverse rights and privileges, as secured by the Constitution of the United States and particularly the First, Fourth, Fifth, Eighth and Fourteenth Amendments thereto, and by the provisions of 42 United States Code 1983, 1985 and 1988.

50. As a direct and proximate result of the foregoing facts and circumstances Joshua DeShaney has been severely and permanently injured; he has suffered multiple abrasions, lacerations, edemas, ecchymoses, skull fractures and brain damage; he has been severely and permanently injured physically, emotionally and mentally; he is permanently and profoundly brain injured and retarded, and is utterly and totally disabled, immobilized, rendered incapable of meaningful communication, and deprived of all normal human cognitive, physical and emotional capacities; he has required and received extensive medical, hospital and nursing care and attention, and attendant and supportive care and attention, and physical, speech, emotional and occupational therapies, and will require such care throughout his lifetime; he has suffered extreme pain and suffering, loss and diminution of the enjoyment of life, loss of income and the capacity to earn income throughout his lifetime; he has incurred, and will for his entire lifetime incur, huge expenses in connection with the furnishing of such required care.

51. As a direct and proximate result of the foregoing facts and circumstances Plaintiff Melody DeShaney has suffered severe physical, emotional and psychic injuries, and has required and received medical, hospital, nursing, psychiatric and psychological care and attention, and has incurred substantial expense therefor, and will for an indefinite length of time in the future and perhaps permanently continue to require such care and attention, and to incur expense therefor; she has suffered extreme mental and emotional harm; and has otherwise and generally been seriously injured.

52. The Defendant Winnebago County and the Defendant State of Wisconsin are liable to pay to the Plaintiffs any judgment obtained herein against the individual defendants Rivetz, Kemmeter and Stelse resulting from acts or omissions committed by said individual defendants, within the scope of their employment while carrying out their duties as an officer or employee, pursuant to Sec. 895.46, Wis. Stats.

53. By reason of the foregoing facts and circumstances the Public Defendants, and each of them, did violate the civil rights of each of the Plaintiffs.

54. By reason of the foregoing facts and circumstances Plaintiffs, and each of them, are entitled to judgment against the Defendants, and each of them, jointly and severally, in the amount of Fifty Million dollars ($50,000,000.00) as actual, general and compensatory damages.

SECOND CAUSE OF ACTION

55. Plaintiffs reiterate every allegation above made, as if here set forth at length and in full.

56. By reason of the foregoing facts and circumstances Defendants, and each of them, did negligently violate the civil rights of each of the Plaintiffs.

THIRD CAUSE OF ACTION

57. Plaintiffs reiterate every allegation above made, as if here set forth at length and in full.

58. By reason of the foregoing facts and circumstances, Defendants, and each of them, intentionally did harm to each of the Plaintiffs and thereby committed intentional tort upon each of the Plaintiffs.

FOURTH CAUSE OF ACTION

59. Plaintiffs reiterate every allegation above made, as if here set forth at length and in full.

60. By reason of the foregoing facts and circumstances Defendants, and each of them, did negligently harm each of the Plaintiffs.

FIFTH CAUSE OF ACTION

61. Plaintiffs reiterate every allegation above made, as if here set forth at length and in full.

62. The actions, omissions, recklessness, misconduct, indifference, willful disregard of the rights, safety and wellbeing of the Plaintiffs, and intentional misconduct of the Defendants, and each of them, are so extreme, bizarre, unjustifiable, unwarranted and utterly unacceptable in a civilized society as to warrant—and indeed demand—the imposition of punitive and exemplary damages, both to punish these Defendants for their misconduct in this case

and to deter these Defendants and others similarly situated from repeating or continuing in similar misconduct in the future as to other persons and other minor children entrusted to their care.

63. By reason of the foregoing facts and circumstances Defendants, and each of them, are obligated to pay punitive or exemplary damages in the further amount of Fifty Million Dollars ($50,000,000.00).

WHEREFORE Plaintiffs pray this Court to accept and retain jurisdiction of this matter until its completion; award judgment to the Plaintiffs, and each of them, against the Defendant jointly and severally for general and compensatory damages in the amount of Fifty Million dollars ($50,000,000.00) and further for punitive or exemplary damages in the separate and additional amount of Fifty Million Dollars ($50,000,000.00); award to Plaintiffs the costs, expenses and disbursement of this action, including reasonable attorneys' fees pursuant to 42 U.S.C. 1988; and grant to Plaintiffs such additional and further relief as may be just and proper.

DATED this 4th day of March, 1985, at Milwaukee, Wisconsin.

JOSHUA DESHANEY and
MELODY DESHANEY, Plaintiff

By: /s/ Curry First
/s/ Donald J. Sullivan

Curry First, Esq.
Guardian ad Litem and
Attorney for Plaintiff
1219 North Cass Street
Milwaukee, WI 53202
(414) 272-7400

Donald J. Sullivan, Esq.
Attorney for Plaintiff
P.O. Box 1854
Cheyenne, WY 82003

JURY DEMAND

Plaintiffs, by their counsel, hereby demand a trial by a jury of six (6) persons of all issues in this action.

Curry First, Esq.
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOSHUA DESHANEY, a Minor,
by His Guardian ad Litem,
Curry First, Esq., and
MELODY DESHANEY,

Plaintiffs,

-vs-

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, WINNEBAGO COUNTY, THE STATE OF WISCONSIN and WISCONSIN DEPARTMENT OF HEALTH & SOCIAL SERVICES, LINDA RIVETZ, ANN KENMETER, CHERYL STELSE and RANDY DESHANEY,

Defendants.

ANSWER

Case No.
85-C-0310

Now come the defendants, Winnebago County Department of Social Services, Winnebago County, Ann Kenmeter and Cheryl Stelse, by their attorneys, Simarski & Stack, Ltd., and for Answer to plaintiff's Complaint, deny, allege and show to the Court as follows:

1. Answering Paragraph 1, deny that plaintiffs' action arises under the due process and equal protection

clauses of the United States Constitution; deny that the relief sought is authorized by Title 42 of the United States Code, Sections 1983, 1985 and 1988 or by the due process and equal protection clauses of the United States Constitution.

2. Answering Paragraphs 2 and 3 of plaintiffs' Complaint, deny knowledge and information sufficient to form a belief as to the truth of the allegations contained therein and put the plaintiffs to their proof thereon.

3. Answering Paragraph 9, deny that the defendant, Ann Kenmeter, was "directly responsible" for the infant plaintiff, Joshua DeShaney, as alleged.

4. Answering Paragraph 10, deny that the defendant, Cheryl Stelse, was "responsible for overseeing the care" of the infant plaintiff, Joshua DeShaney, as alleged.

5. Answering Paragraph 15, upon information and belief, deny that a Notice of Injury and Claim was properly served on the defendants, Winnebago County Department of Social Services and Ann Kenmeter, as alleged.

6. Answering Paragraph 16, deny knowledge and information sufficient to form a belief as to the truth of the allegations contained therein.

7. Answering Paragraph 17, deny that the defendant, Randy DeShaney, "repeatedly battered, assaulted and abused Joshua DeShaney, physically, mentally and emotionally" as alleged.

8. Answering Paragraph 18, deny that Chris DeShaney reported to the answering defendants during the years 1982 or 1983 the allegations contained within Paragraph 17 of plaintiffs' Complaint.

9. Answering Paragraph 19, admit that the incident of November 30, 1983 was reported to the Winnebago County Department of Social Services; deny that Dr. T. L. Bowers, M.D. reported to these answering defendants a "diagnosis" of "child abuse."

10. Answering Paragraph 20, admit that the Oshkosh Police Department responded to complaint calls on the dates set forth in Paragraph 20 of plaintiffs' Complaint; deny that said complaints all involved "family violence" as alleged.

11. Answering Paragraph 21, allege a lack of sufficient knowledge and information to form a belief concerning the truth of the allegations contained therein and therefore deny same.

12. Answering Paragraph 22, deny that these answering defendants "knew or by the exercise of even slight care reasonably should have known" of the facts and circumstances alleged by the plaintiff; further deny that answering defendants "knew or by the exercise of even slight care reasonably should have known" of the alleged "strong likelihood and great danger of child abuse being committed upon Joshua DeShaney."

13. Answering Paragraph 23, deny all of the allegations set forth therein; further move to strike Paragraph 23 as setting forth a conclusion of law.

14. Answering Paragraph 24, deny that these answering defendants "undertook" to supervise, monitor, oversee and promote the care, welfare, safety and well being of Joshua DeShaney as alleged.

15. Answering Paragraph 25, deny that these answering defendants caused Joshua DeShaney to be removed from the custody of Randy DeShaney as alleged.

16. Answering Paragraph 26, deny that these answering defendants subsequently caused and permitted Joshua DeShaney to be taken out of protective placement and returned to the custody of Randy DeShaney as alleged.

17. Answering Paragraph 27, deny that these answering defendants in any way actively concealed and withheld from the plaintiff, Melody DeShaney, knowledge and information concerning any of the five areas set forth in Paragraph 27 and therefore deny Paragraph 27 in its entirety.

18. Answering Paragraph 28, allege insufficient information and knowledge to form a belief as to the allegations set forth therein and therefore deny same.

19. Answering Paragraph 29, deny that these answering defendants knew the location, address and telephone number of the plaintiff, Melody DeShaney, at all relevant times.

20. Answering Paragraph 30, deny all of the allegations set forth therein in their entirety.

21. Answering Paragraph 31, deny that the alleged "child abuse" continued throughout the entire period of time Joshua DeShaney was in the custody of Randy DeShaney; deny that answering defendants were under a "legal duty and obligation" to protect Joshua DeShaney and to provide and promote his welfare and well being; further move to strike the latter allegation in Paragraph 31 as setting forth a conclusion of law.

22. Answering Paragraph 35, allege a lack of sufficient information and knowledge to form a belief as to the allegations set forth therein and therefore deny same.

23. Answering Paragraph 36, allege a lack of sufficient knowledge and information to form a belief as to the allegations contained therein and therefore deny same.

24. Answering Paragraph 37, deny that these answering defendants failed and omitted to properly supervise, protect and provide and promote the welfare of Joshua DeShaney as alleged.

25. Answering Paragraph 38, deny that defendants, Winnebago County and Winnebago County Department of Social Services, promulgated and followed policies and practices in violation of applicable State laws; further deny that said defendants failed to establish specific and written policies and practices; deny any statutory duty to establish and follow such written policies and practices; deny that said defendants abandoned any responsibilities; further deny that said defendants delegated the "policy-making and decision functions" to the individual defendants as alleged.

26. Answering Paragraph 39, deny any "failures" as alleged against the defendant, Winnebago County Department of Social Services.

27. Answering Paragraph 40, deny that it was the "policy, custom and practice" of the defendants, Winnebago County and Winnebago County Department of Social Services, to delegate to the individual defendants the "authority, power, right and responsibility to make decisions and to take actions for and on behalf of" said

defendants with respect to "individual welfare and child protection cases and with respect to general welfare and child protection matters."

28. Answering Paragraph 41, deny that the defendants, Winnebago County and Winnebago County Department of Social Services, "did in fact delegate to the individual defendants" the "authority, power, right and responsibility" as alleged.

29. Answering Paragraph 42, deny that the defendants, Winnebago County and Winnebago County Department of Social Services, "authorized, approved, ratified, condoned and adopted the decisions, actions and omissions of the individual defendants" as alleged, further deny that the defendants, Winnebago County and Winnebago County Department of Social Services, "made and constituted" such decisions, actions and omissions of the individual defendants as their own as alleged.

30. Answering Paragraph 43, deny any omissions on behalf of defendants, Ann Kenmeter and Cheryl Stelse; further deny that any alleged policies, decisions, actions and omissions of the public defendants "violated the accepted standards of good practice in the fields of social work and child protection;" further deny that the alleged policies, decisions, actions and omissions of the public defendants violated applicable Federal and State Statutes, Laws and Regulations.

31. Answering Paragraph 44, deny any omissions on behalf of defendants, Ann Kenmeter and Cheyl Stelse; further deny that any alleged policies, decisions, actions and omissions of the public defendants were taken "know-

ingly, carelessly, negligently, willfully, recklessly and with indifference to and disregard of the known dangers to Joshua DeShaney and of the civil rights'' of the plaintiffs.

32. Answering Paragraph 45, deny any omissions on behalf of defendants, Ann Kenmeter and Cheyl Stelse; deny that any alleged policies, decisions, actions and omissions of the public defendants ''were not taken in good faith'' as alleged; further deny that the alleged policies, decisions, actions and omissions of the public defendants were taken under the circumstances previously described in plaintiffs' Complaint; affirmatively show to the Court that any alleged policies, decisions, actions or omissions of the public defendants, Ann Kenmeter and Cheryl Stelse, were within the good faith exercise of governmental authority.

33. Answering Paragraph 46, deny any omissions on behalf of the defendant, Ann Kenmeter and Cheyl Stelse; further deny that any alleged policies, decisions, actions and omissions were ''taken under and pursuant to color of State law, including without limitation Section 48.891 Wisconsin Statutes, 1981-1982'' as alleged.

34. Answering Paragraph 47, deny any acts and or omissions on behalf of defendants, Ann Kenmeter and Cheryl Stelse as alleged.

35. Answering Paragraph 48, deny all of the allegations of Paragraph 48 in their entirety.

36. Answering Paragraph 49, deny all of the allegations of Paragraph 49 in their entirety.

37. Answering Paragraph 50, deny all the allegations of Paragraph 50 in their entirety.

38. Answering Paragraph 51, deny all of the allegations of said Paragraph in their entirety.

39. Answering Paragraph 52, deny that the defendant, Winnebago County, is liable to pay to the plaintiffs any Judgment obtained against the individual defendant, Linda Rivetz; further deny that Section 895.46 Wisconsin Statutes, requires defendant, Winnebago County, to pay the plaintiffs any Judgment obtained against the individual defendants, Ann Kenmeter and Cheryl Stelse as alleged; and affirmatively show to the Court that said Wisconsin Statute requires the State and political subdivisions thereof to pay Judgments taken against officers if the defendant in any action or special proceeding is a public officer or employee and is pursued against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the Court finds that the defendant was acting within the scope of employment, the Judgment as to damages and costs entered against the officer or employee in excess of any insurance applicable to the officer or employee is to be paid by the State or political subdivision of which the defendant is an officer or employee.

40. Answering Paragraph 53, deny that defendants, Winnebago County and Winnebago County Department of Social Services, in any way violated the civil rights of the plaintiff.

41. Answering Paragraph 54, deny that the plaintiffs are entitled to Judgment against these answering defendants in the amount of Fifty Million ($50,000,000.00)

Dollars as actual, general and compensatory damages or in any other amount.

ANSWER TO "SECOND CAUSE OF ACTION"

42. Answering Paragraph 55, incorporate herein by reference as if fully set forth Paragraphs 1 through 41 of the Answer of the defendants, Winnebago County, Winnebago County Department of Social Services, Ann Kenmeter and Cheryl Stelse.

43. Answering Paragraph 56, deny the "foregoing facts and circumstances" as alleged; deny that these answering defendants in any way negligently violated the civil rights of the plaintiffs; deny any violation of civil rights of the plaintiffs; deny any violation of civil rights of the plaintiffs [sic].

ANSWER TO "THIRD CAUSE OF ACTION"

44. Answering Paragraph 57, incorporate herein by reference as if fully set forth Paragraphs 1 through 43 of the Answer of defendants, Winnebago County, Winnebago County Department of Social Services, Ann Kenmeter and Cheryl Stelse.

45. Answering Paragraph 58, deny the "foregoing facts and circumstances" as alleged; deny that these answering defendants in any way intentionally did harm to each of the plaintiffs; further deny that these answering defendants in any way committed an intentional tort upon the plaintiffs.

ANSWER TO "FOURTH CAUSE OF ACTION"

46. Answering Paragraph 59, incorporate herein by refernce as if fully set forth, Paragraphs 1 through 45 of the Answer of the defendants, Winnebago County, Winnebago County Department of Social Services, Ann Kenmeter and Cheryl Stelse.

47. Answering Paragraph 60, deny the "foregoing facts and circumstances" as alleged; deny that these answering defendants were negligent in any manner; deny that these answering defendants negligently harmed the plaintiffs as alleged.

ANSWER TO "FIFTH CAUSE OF ACTION"

48. Answering Paragraph 61, incorporate herein by reference as if fully set forth, Paragraphs 1 through 47 of the Answer of the defendants, Winnebago County, Winnebago County Department of Social Services, Ann Kenmeter and Cheryl Stelse.

49. Answering Paragraph 62, deny the "actions, omissions, recklessness, misconduct, indifference" alleged against these answering defendants; deny any "willful disregard of the rights, safety and wellbeing of the plaintiffs;" deny any "intentional misconduct;" deny that the plaintiffs are entitled to "punitive and exemplary damages" as alleged; deny any misconduct; therefore deny all allegations of Paragraph 62.

50. Answering Paragraph 63, deny the 'foregoing facts and circumstances" as alleged; deny that these answering defendants are obligated to pay "punitive or exemplary damages;" deny that plaintiffs are entitled to "punitive or exemplary damages" as alleged.

AFFIRMATIVE DEFENSES

Now come the defendants, Winnebago County, Winnebago County Department of Social Services, Ann Kenmeter and Cheryl Stelse, by their attorneys, Simarski & Stack, Ltd., and for Affirmative Defenses to the Complaint of the plaintiffs, state as follows:

1. That plaintiffs' Complaint fails to state a claim upon which relief can be granted.

2. That the actions taken by the defendants, Ann Kenmeter and Cheryl Stelse, were within the good faith exercise of governmental authority and that the defense of qualified individual immunity is applicable to said defendants.

3. To the extent that plaintiffs' Complaint attempts to state a cause of action for punitive damages, plaintiffs have failed to state a cause of action for such damages.

4. That these answering defendants raise by way of Affirmative Defenses, each and every provision of the Wisconsin Statutes pertaining to claims against governmental bodies, officers and employees as if fully set forth herein including but not limited to the provisions of the Wisconsin Statutes Section 893.80 limiting the amount and extent of damages, if any, recoverable by the plaintiffs.

5. Upon information and belief, plaintiffs have failed to mitigate their damages, if any.

WHEREFORE, defendants, Winnebago County, Winnebago County Department of Social Services, Ann Kenmeter and Cheryl Stelse, demand Judgment dismissing the

Complaint of the plaintiffs on its merits together with costs and disbursements in defense of same.

Dated at Milwaukee, Wisconsin this 26th day of March, 1985.

SIMARSKI & STACK, LTD.

/s/ By: Mark J. Mingo

/s/ By: Wayne M. Yankala

Attorneys for Defendants, Winnebago County, Winnebago County Department of Social Services, Ann Kenmeter and Cheryl Stelse

P.O. ADDRESS

611 North Broadway
Milwaukee, Wisconsin 53202
(414) 273-7400

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

(Caption omitted in printing)

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND/OR FOR JUDGMENT ON THE PLEADINGS

Defendants, Winnebago County Department of Social Services, Winnebago County, Ann Kemmeter and Cheryl Stelse, by their attorneys, Simarski & Stack, Ltd., by Mark J. Mingo, move the Court pursuant to Rule 12(b)(6) and Rule 12(c) of the Federal Rules of Civil Procedure to Dismiss plaintiff's Complaint for failure to state a claim upon which relief can be granted and/or for Judgment on the pleadings.

This Motion is based upon the Brief accompanying this Motion together with the pleadings presently filed with the Court.

Dated at Milwaukee, Wisconsin this 22nd day of October, 1985.

SIMARSKI & STACK, LTD.

By: _____
MARK J. MINGO

Attorneys for Defendants
Winnebago County Department
of Social Services, Winnebago
County, Ann Kemmeter and
Cheryl Stelse

P.O. ADDRESS

611 North Broadway
Milwaukee, Wisconsin 53202
(414) 273-7400

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
(Caption omitted in printing)

AFFIDAVIT

State of Wisconsin)
) ss.
Milwaukee County)

MARK J. MINGO being duly sworn on oath deposes and states as follows:

1. That he is an attorney licensed to practice law in the State of Wisconsin and is associated with the law firm of Simarski & Stack, Ltd. attorneys for defendants, Winnebago County Department of Social Services, Winnebago County, Ann Kemmeter and Cheryl Stelse, in the above-referenced action.

2. That on August 27, 1985, August 28, 1985, August 29, 1985, October 1, 1985 and October 3, 1985 plaintiffs' counsel conducted the deposition of the defendant, Ann Kemmeter; that attached hereto and marked as "Exhibit A" are excerpts from said deposition which are incorporated herein by reference as if fully set forth.

3. That on September 10, 1985, the deposition of Thomas R. Hoare was conducted; that attached hereto and marked as "Exhibit B" are excerpts from said deposition which are incorporated herein by reference as if fully set forth.

4. That on September 12, 1985, the deposition of Keith L. Nelson was conducted; that attached hereto and marked as "Exhibit C" are excerpts from said deposition

which are incorporated herein by reference as if fully set forth.

5. That on October 24, 1985, and October 25, 1985, the deposition of the plaintiff, Melody DeShaney, was conducted; that attached hereto and marked as "Exhibit D" are excerpts from said deposition which are incorporated herein by reference as if fully set forth; also attached hereto is a true and accurate copy of "Exhibit A" from said deposition which is attached to this Affidavit and marked as "Exhibit E," and is incorporated herein by reference as if fully set forth.

That all of the above depositions were taken in relation to the above litigation and that the excerpts therefrom incorporated into this Affidavit are being filed with the Court in support of the Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and/or For Judgment on the Pleadings previously filed by the defendants, Winnebago County Department of Social Services, Winnebago County, Ann Kemmeter and Cheryl Stelse.

Dated at Milwaukee, Wisconsin this 2nd day of December, 1985.

/s/ Mark J. Mingo
(Jurat omitted in printing)

EXHIBIT A

(p. 3) PROCEEDINGS

ANN KEMMETER, called as a witness herein by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. SULLIVAN:

Q What is the correct pronunciation of your name?

A Ann Kemmeter.

Q And that's spelled K-e-m-m-e-t-e-r?

A Correct.

Q We have a small room and a big air conditioner. Can you hear me okay?

A So far.

Q If at any point today or any point during your deposition you can't hear me, will you tell me so I can talk louder and make sure you can hear me?

A Yes, I will.

Q And if at any point you don't understand what I'm asking you, will you tell me so I can ask it better?

A Yes, I will.

Q What understanding do you have of the purpose of a deposition such as what're doing today?

A My understanding of the deposition today is that I will be testifying as to my involvement with the DeShaney case as to what happened.

• • •

(p. 34) had contact with Randy DeShaney.

Q Why wasn't this case given to Mr. Donner?

A The incident of January 22nd, 1983, occurred on a weekend. On a weekend we do not have anyone necessarily on call, but the police and/or hospital go through help line.

Because I happen to live in Neenah, sometimes they will call me direct, knowing that I am—or I was a child protective service worker at that time.

So in this event, if I recall correctly, Tom Hoare, the hospital social worker, called me directly at home. I was home, I responded immediately.

Q Physically where is Theda Clark?

A Theda Clark is located at 130 2nd Street in the City of Neenah.

Q When it got to be Monday and back to the normal workweek, why did the case become your case instead of becoming Mr. Donner's case?

A I had already made my initial contact, therefore, there was no reason for a change of workers.

Q Was Mr. Donner still with the department at that time?

A Yes.

Q Is he still now?

A Yes, he is.

Q Did you—As part of doing your workup, did you look at (p. 35) the existing—existing file? I realize it wasn't as big as what you have there, but did you look at the file that had already been created about Joshua?

A As of January 24th?

Q Right.

A No.

Q Did you ever look at the file that was already in existence?

A Eventually I did.

Q Okay. That's something you'd normally do, isn't it?

A Essentially, yes. That was not a point in issue at that point in time. The point was this child was hospitalized, and we needed to carry on with the present ongoing investigation.

Q When did you look at the existing materials in the Joshua DeShaney file?

A I don't recall.

Q Well, was it pretty early in the process, or was it a year later?

A It was within a reasonable time. If another initial contact sheet is completed, a cross-reference is done within the agency to determine if there were any other contacts

with the family. The record is then compiled, put together, and forwarded to me.

Q And the reason for that cross-checking, cross-indexes and

* * *

(p. 47) Chris?

A It's in Christine's name. It states the same thing, marriage assessment group, dash, Chapter 247.081 (Section 1). Assessment reads certified to family court commissioner.

Q And the fourth one is dated January 22 of '83?

A Correct. Precipitating situation states that Joshua's Aunt, Marie DeShaney, brought him into Theda Clark Regional Medical Center because of numerous, unexplained bruises over entire body. It was alleged that he was hit with a toy truck by a two year old.

Temporary physical custody was given over to Theda Clark Regional Medical Center for an investigation to be done because of the child's numerous bruises. Parties were interviewed, and the child protection team meeting was held at Theda Clark Regional Medical Center on January 25th, 1983. Joshua remains a patient on the pediatric ward of Theda Clark Regional Medical Center.

Q I take it from the last sentence or two that you just read from this particular initial contact sheet that at least part of it was filled out after the follow-up activities were conducted?

A This was the initial contact sheet to open the case immediately.

Q Perhaps I misunderstood. Didn't you just read something

* * *

(p. 56) that question.

Q Well, let me put the question to you this way. What you just testified to, I think, was that if your department is contacted directly by the hospital personnel, whether it's an ER nurse or a social worker, whatever, if you department was contacted directly by the hospital personnel about what may be a child abuse situation, then the policy is that you have a child protective team meeting; am I understanding you rightly so far?

A Right.

Q And then you said that the team meeting consists of medical people who have knowledge of the situation, the caseworker, the assistant corporation counsel, who else?

A I believe I stated law enforcement, nursing staff.

Q Now, is that—is it your testimony that you don't know whether someplace in these big blue books there's a written down rule about these team meetings; you don't know whether it's written down or not?

A No.

Q And is that the reason you say that Cheryl Stelse would be in a better position to tell us about that rule?

A Yes.

Q Okay. As a working caseworker, is it your understanding that that's the practice that's expected to be followed in your department, whether it's written down or not

* * *

(p. 61) not safe in their home environment.

If there was evidence that this child had suffered severe injuries or was not safe in their home, we would request temporary physical custody of the child for placement outside of the home till the matter could be heard in juvenile court.

If we felt that the child could remain in the home, that the situation could be rectified within the home, we could offer casework services, offer community resources to assist the parents. We could or could not, depending upon the assessment, still request court jurisdiction for placement of that child within his home, but then it would be mandated services that the department remain involved with the family.

Q Okay. Now, those are a range of options and decisions that can be selected, right?

A Right.

Q Okay. Who's supposed to make those determinations, and who's supposed to select those options?

A With the information that we gather, if we feel that there is strong evidence that this child may be in danger, we contact the assistant corporation counsel, in this case John Bodnar, Winnebago County, have him review the information with us.

We may involve the juvenile court intake (p. 62) worker to also review the information with Mr. Bodnar, at which time he determines whether or not there is enough evidence for this matter to be brought before juvenile court.

Q Well, back up. Who makes the determination initially as to whether it's safe or not safe for the child to remain in the home?

A This is, again, going to be contingent upon the professionals that are involved at that particular point of time.

If we are in the emergency room of a hospital, it may be the physicians, it may be the nursing staff, the hospital social worker, my input, law enforcement's input.

If we were in a school, it may be a discussion between the school authorities, perhaps the reporter, depending upon who he is, the department, law enforcement. We're trying to gather and use the expertise of those individuals involved in the situation to help make that determination.

Q Who makes the determination?

A It is a consensus of us at that point.

Q Does the teacher—Does the teacher get a vote?

A We don't vote. He or she has input into our discussion to determine, yes.

(p. 63) Q Now, is the deal that you, as the caseworker, go see the teacher or you go see the cop who investigated or you go see whoever else knows about things?

A Often law enforcement goes with us.

Q Do you go to see these people, or do you wait until you can schedule a group meeting at everybody's convenience?

A No, we go to see them.

Q You go to see them?

A I go to see them.

Q And you listen to what all the informed people have to contribute?

A. Yes.

Q And then when you've gathered up those pieces of information and input, what do you do with them?

A I would make a determination as to whether or not, from the information that these professionals have given me, as to whether or not this child is safe in the environment, whether I need to contact juvenile court intake for temporary physical custody order, and then subsequently contact our assistant corporation counsel for further proceedings.

Q And you make that determination—And you make that determination on the basis of all the information you've been able to pull together?

A That's correct.

• • •

EXHIBIT B

(p. 3) TRANSCRIPT OF PROCEEDINGS

THOMAS R. HOARE, called as a witness herein by the Defendants, having been first sworn, was examined, and testified as follows:

EXAMINATION

BY MR. MINGO:

Q Would you state your name for the record and spell your last name, please?

A Thomas R. Hoare, H-O-A-R-E.

Q What's your age, sir?

A 43.

Q Where do you reside?

A 1490 Breezewood Lane, Neenah, Wisconsin.

Q Are you employed at the present time?

A Yes, I am.

Q And where are you employed?

A At Theda Clark Regional Medical Center in Neenah.

Q In what capacity?

A Medical social worker.

Q And would you—How long have you been employed as a medical social worker at Theda Clark?

A Approximately seven and-a-half years.

Q Have your duties and responsibilities over that seven and-a-half year period been basically the same?

A Yes, they have.

(p. 4) Q And would you describe for us at this time what your duties and responsibilities as social worker entail?

A You want the total or just pertaining to the situation?

Q Well, why don't we try with this situation and see how you do?

A Okay. Part of my responsibilities is to the emergency room at Theda Clark, and I am the coordinator of what's called the child protection team, and therefore, automatically we receive any referrals regarding possible child abuse, spouse abuse, people who come to the hospital with injuries other than by accidental means.

Q Does that mean that everytime an individual enters the hospital where there's a suspicion of child abuse you will be notified of that?

A Yes, it does.

Q Would you give me a brief history of your educational background, please?

A Graduated from Wisconsin State University of Oshkosh in 1964 with a bachelors degree, a major in social work and psychology, and I have 15 credits towards my masters degree in social work from the University of Wisconsin Extension Center.

I have attended numerous in-service training seminars, et cetera, on various forms of social work including child abuse, child neglect detection.

• • •

(p. 10) protection team regarding Joshua on December 25, 1983.

Q Could you explain to me how that summary is prepared?

A For the record I perhaps should explain what the child protection team is.

Q I was going to get to that in a minute. If you'd rather do it now, go ahead.

A It would put things in a better context. The child protection team is a conglomerate of people who are called together to help determine if we feel that we have a child abuse situation and to determine if it's safe for the child to return home, and to make recommendations to the Department of Social Services as to what can be done to alleviate the conditions of abuse that has been caused or improve the family situation of a child.

The child protection team started at Theda Clark probably about, I guess, ten years ago or so, I'd have to look specifically. But for this child protection team we had: Myself; nursing personnel from the emergency room in the pediatric unit; Doctor Robert Gehringer, who is a pediatrician involved; Dr. Donald DeRozier, who is a psychologist; Ann Kemmeter from Winnebago County Department of Social Services; Detective Keith Nelson from the Neenah Police Department; John Bodner, Corporation

Counsel, Winnebago County Department of Social Services; and a secretary from our department (p. 11) who took notes. The purpose—Well, I explained to you what the purpose of the team is.

Q I missed a part of that explanation. You said you try to determine whether or not this is a case of abuse, and you also said you attempt to make recommendations to the Department of Social Services on the future handling of the case, and one other thing that I missed?

A We try to determine if it's safe for the child to return home.

Q Now this particular report concerning the child protection team meeting on Joshua DeShaney was prepared by Joanne Smith, the secretary?

A That's right.

Q How was it—strike that. This isn't a verbatim transcription of what transpired now, is it?

A No, it is not.

Q How is it determined what goes into this report and what doesn't?

A She takes notes and then types up her notes.

Q She's present during the entire meeting, is that it?

A That's right.

Q And she determines what she's going to put into this report and what she's going to leave out without conferring with anyone else?

A Okay. After she does a rough draft of the report, I go (p. 12) over it and then make any corrections or add other things that should go into it.

Q If there are additions or deletions, you'll inform her?

A. That's right.

Q What else do you have there?

A Well, copies of subpoenas. A confidential medical information release form signed by Randy DeShaney and witnessed by Ann Kemmeter allowing Theda Clark Regional Medical Center to release copies of medical records to the Winnebago County Department of Social Services.

Mr. Sullivan: The date, please?

A The date? 1-25-83.

Mr. Sullivan: Thank you.

BY MR. MINGO:

Q Is there an expiration date on that?

A Six months. Not to exceed six months.

Q Okay.

A Okay. Then I have copies of my rough notes that I had taken while I was interviewing the child and the parties that were involved.

Q Does that cover your entire file?

A Yes, it does.

Q I believe you indicated that you were first contacted relative to Joshua DeShaney on January 22, 1983?

A That's true.

(p. 13) Q Who were you contacted by?

A I was called by the nurse at the emergency room.

Q Do you know who that is?

A I think it probably was Ruth Stanke.

Q And what did the nurse relate to you when you were contacted?

A She indicated to me that they had a child there who was approximately three years old and they suspected that the child had been physically abused. She indicated that there were a number of bruises on the child and the child was brought in by an aunt.

Q And you later found out that the Aunt was Marie DeShaney?

A. Right.

Q Was any other information—strike that. You were contacted by telephone; is that right?

A That's right.

Q Was any other information related to you by telephone—

A None.

Q —at that time?

A (witness nods.)

Q What did you do then?

A I went to the emergency room.

Q It's your understanding that this happened on a Saturday or a Sunday?

A If I remember correctly, I think it was a Saturday.

• • •

(p. 16) cage, and then he had a bristle-like brush indication on his buttocks.

Q Are those all the injuries that you at this time recall seeing, or simply something that you're reading off the medical report?

A I recall seeing those.

Q Okay. Now I think you said you were going to refer to a second document as well?

A I did. I referred to both, I'm sorry, my own notes indicating the bristle-like brush on the buttocks.

Q Did you then attempt to make some type of written notation of what you saw after you looked at the child?

A I did not right at that time.

Q What is that sheet that you're just referring to there?

A These are notes that I took after I had sat down and started putting everything together in chronological order. After I had seen the child, talked with Dr. Gehringer, and talked with the caretaker who brought the child in, I proceeded to call Winnebago County Department of Social Services and the Neenah Police Department.

Q Those notes that you're holding in your hands, is that something that you prepared on January 22 of 1983?

A Uh-hum.

Q That's, "yes"?

A Well, it would either be the 22nd or 23rd. It would

• • •

(p. 25) them, showed them Joshua, pointing out the bruises that he had on his body and indicating to them my questions as to how those bruises had gotten there and indicating the different ages of the bruises and also the bristle-type mark on his buttocks.

Q And then you indicated to both Detective Nelson and Ann Kemmeter why you felt the child should be taken into temporary physical custody?

A That's right.

Q And why was that?

A Because I did not feel that it was safe for the child to be released to me. I did not have a history as to really what had happened to this child, and the father was not available to contact to get a history. And if the child was going to be admitted to the hospital, we would either have to have temporary custody of that child to admit the child or have the permission of the parent.

Q And since the parent wasn't around, you couldn't get permission?

A That's right.

Q Now were you responsible for initiating the action to obtain temporary physical custody of the child, or was that a request you made to Ann Kemmeter and she was supposed to follow through with that?

A That was a request made to Ann Kemmeter and she and (p. 26) Detective Nelson followed through with that.

Q Did you have any further contact with anyone involving this case once you spoke with Detective Nelson and Ann Kemmeter on January 22 of 1983?

A None except for Marie.

Q Okay. You had a second interview with Marie?

A No, No, I mean. you said anybody else besides. I had contact with Marie, Ann Kemmeter and Detective Nelson.

Q After you spoke with Ann Kemmeter and Detective Nelson, what did you do next?

A At that point I went up to the pediatric unit and informed the pediatric unit that it was my feeling that Joshua DeShaney was being admitted to the hospital and appraised them that this is a possible child abuse situation and reminded them what it meant, that the child be in protective custody and asked them to be extra sensitive to the interaction between the patient and the parent or caretakers who may have been coming up to see him.

Q Do you recall who you would have spoken to in the pediatric unit?

A I don't recall for sure who I talked to.

Q Before you decided that temporary physical custody should be taken of the child, did you consult with Dr. Gehringer?

* * *

(p. 37) A The only thing that I recall from that is where I learned that there was alcohol in the bottle that the child had when they picked him up from the mother.

Q That's something that Chris DeShaney indicated to you?

A Yes.

Q And I think you said you don't have any notes reflecting that conversation with Chris, do you?

A No, I do not.

Q Do you recall anything else about that conversation?

A None.

Q Did you interview anybody else that day?

A No, I did not.

Q What other involvement did you have with the case on January 24?

A None.

Q Okay. What was the next involvement that you did have?

A Calling a child protection team staffing on January 25, 1983.

Q And how do you go about calling a child team staffing?

A By phone indicating to all the persons involved that we'll be having a child protection team staffing regarding this child, and it usually takes place at noon, because that's when the doctors can be there.

Q And do you more or less coordinate this child protection team meeting?

(p. 38) A That's right.

Q And who determines who the participants in the child protection team meeting will be?

A I am a part of that selection, along with any personnel from County Social Services or doctors who may be requesting the team staffing. In this case all persons who would have been involved with this child or family since the child was admitted to the hospital were asked to participate.

Q Did anyone who was asked to participate refuse to participate?

A Not that I recall.

Q Okay. Now you have that one typewritten page summarizing thhe child protection team meeting?

Mr. Sullivan: Excuse me, I think it's two pages.

Mr. Mingo: Two pages?

A That's true.

BY MR. MINGO:

Q That's dated January 25, 1983?

A That's true.

Q At the top it indicates those present; is that correct?

A That's right.

Q That was yourself, Mary Koslowski?

A That's right.

(p. 39) Q And who is she and why was she there?

A She is an LPN on the pediatric unit at Theda Clark, and she would have been probably having direct contact with Joshua in patient care.

Q Do you recall what, if any, input Mary Kozlowski had with respect to the ultimate consensus or recommendation that was reached at the child protection team meeting?

A No, I do not. Any of the nursing personnel who would have been involved would have indicated the type of relationship they may have seen between the patient and the parents, and I do not recall anything specifically said by her at that time.

Q So you don't really recall what, if any, input Mary Kozlowski had in the child protection team meeting?

A No, I do not.

Q Now Jean Anne Miller, who's she?

A She is an LPN from the emergency room. She would have been in the emergency room when Josh was brought in.

Q Do you recall what, if any, input Ms. Miller would have had?

A None.

Q She had none, or you don't recall?

A I don't recall any.

Q Same question with respect to Kathi Hoss, what involvement, if any, did she have?

(p. 40) A I don't recall her having any input.

Q What about Rosalind Stanke?

A Rosalind Stanke did have input. She was the nurse who originally had called me. By the way, I gave you the wrong name before. I think I said Ruth Stanke, and it is Rosalind. She was the nurse who had originally called me and also was involved in examining the child. She would have been the one who would have indicated that Marie was very hesitant to allow the nurses to strip the child in the emergency room.

Q Now Jean Nolan is an RN at Theda Clark?

A That's true.

Q Do you recall what, if any, involvement Jean Nolan had?

A I believe Jean Nolan was with Rosalind Stanke in the room in examining the child, or in preparing to have the doctor examine the child and stripping down the child.

Q And then Melissa Borth, B-O-R-T-H, is an RN at Theda Clark?

A True, she would be the nurse on pediatrics.

Q Do you recall what, if any, significant input she had into the child protection team meeting?

A I don't believe she had any.

Q What about Mary Armbruster?

A She had patient contact also. She is an LPN on pediatrics. And if I recall, she indicated the type of (p. 41) relationship she saw between the child and the parent.

Q What type of relationship did she indicate she saw?

A Close relationship between Joshua and his father.

Q Of what significance was that to you, if any?

A May I please back up?

Q Sure.

A I remember distinctly one of them saying that whenever Randy would walk into the room, Joshua would come running to him with his arms out wanting to jump up into his arms and be hugged by him, and that there was a good relationship between father and son. That indicates to me that if Joshua is afraid of his father, he would not be doing that.

Q Did that indicate anything to you in terms of whether or not Joshua was, in fact, a child-abused victim?

A No.

Q Okay. Did it indicate to you anything with respect to whether or not Joshua was a victim of child abuse, with that abuse being perpetrated by Randy DeShaney?

A That's where the question comes in. Because of that behavior I would have to question whether Randy was physically abusing his son.

Q And in your experience that's something you wouldn't expect if Randy was, in fact, abusing Joshua at that time?

(p. 42) A That is true.

Q I think you were about to tell me what Mary Armbruster observed in terms of the relationship between Mary and son?

A That there was a good relationship, that she was the one who indicated when Randy would walk in the room Josh would come running to him.

Q And the next individual listed as attending the child protection team meeting is Donald DeRozier, M.D.; is that correct?

A That is true. He is a psychologist.

Q Is he a psychiatrist, as well?

A He is not a psychiatrist, he is a psychologist.

Q And how was it that Dr. DeRozier entered this case?

A He was called in consulation by Dr. Gehringer to do a psychological evaluation on the child.

Q Did he do a psychological evaluation of the father, as well?

A I don't believe he did a full scale psychological evaluation of the father, although he did have an interview with him.

Q Did Dr. DeRozier have any involvement other than the psychological evaluation of the child and a partial evaluation of the father?

A None except for his input with the child protection team.

(p. 43) Q What was his input with respect to the child protection team?

A Dr. DeRozier though that the father and son should stay together and that there should not be another

woman involved in the family situation, and that they should be seen professionally. And he also recommended that the child be involved in a program like Head Start.

Q Do you know what he meant by indicating that the child should be seen professionally?

A Yes. That social worker counseling be set up to work with the father and son. If I remember correctly, Dr. DeRozier's study of the child indicated that the child did have some behavior problems that he needed some help with.

Q Did he recommend that the child be returned to the father?

A Yes.

Q Do you recall any other imput that Dr. DeRozier had into the child protection team meeting?

A No, I do not.

Q Dr. Gehringer is the next person listed as attending the child protection team meeting, and he's a pediatrician at Theda Clark?

A He is a pediatrician who has the right to practice at Theda Clark. He is with Nicolet Clinic.

(p. 44) Q And he is the doctor that examined Joshua when he was brought to the emergency room on January 22?

A That's true.

Q What was Dr. Gehringer's input into the child protection meeting?

A What he had done was described the physical findings of the child when the child was brought into the hospital and the results of the tests that were run on the child.

Q When you indicate that he described the physical findings, does he just read off the face sheet of the emergency room report, or did he tell you something more than that?

A I don't recall if he had his own notes or not.

Q Was he questioned or did he render an opinion as to whether or not he suspected child abuse?

A After everybody had the opportunity to give their input as to what they saw and what areas, there was a discussion. The discussion was, was there abuse? Can we say that abuse took place? If there was abuse, who did the abusing, and what can be done to alleviate the conditions that caused the abuse? There's more to that, more to this than what I'm saying right now.

In looking at all the evidence that was there, John Bodnar, Corporation Counsel for Winnebago County Department of Social Services indicated that he (p. 45) felt that there was not enough physical evidence to take this matter to court to get legal custody of the child for placement or make any other referrals to the Court system.

With that opinion the child protection team then started looking at what would be the best for handling this situation. We could not prove that this was child abuse, but we knew that there was a problem. We had Randy who apparently had indicated to probably Ann Kemmeter or to Keith Nelson that there was a problem.

I know there was a lot of suspicion that Marie possibly/ probably could have been the person who was doing the abusing. Could not prove that. The recommendation of the team was—

Q Can I stop you for a second, we're really getting ahead of ourselves here.

A Okay.

Q I guess my question that started this whole thing was whether or not Dr. Gehringer indicated to the group at the child protection team meeting that he suspected child abuse?

A I believe he did. He suspected child abuse when the child initially came in to the hospital.

Q Was he asked at this child protection team meeting whether or not he suspected child abuse?

(p. 46) A I don't remember.

Q Do you recall anything—strike that. Do you recall any input that Dr. Gehringer had at this team meeting other than to read the physical findings?

A He participated in the discussion.

Q I take it that the discussion followed after everyone had all the initial input that they wished to have?

A That is right.

Q And John Bodnar indicated that he felt that there was not enough evidence to take this case to court, you said, correct?

A That's right.

Q Did he indicate that after everyone had their initial input?

A That is right.

Q Did he indicate that after or before the final discussion you had, or was that part of the final discussion?

A Part of the final discussion.

Q Do you recall what input, if any, Anne Wilson, W-I-L-S-O-N, had?

A No, I do not.

Q What about Ann Kemmeter?

A Ann Kemmeter would have given a brief social history of Joshua DeShaney, Randy DeShaney, and Marie, the three primary persons involved.

(p. 47) Q What input did Detective Keith Nelson have?

A He would have given the physical evidence that he would have obtain [sic] in his investigation.

Q Do you recall what that was?

A No, I do not. I do not have a copy of his report. I remember that he had gone to the house and taken pictures and interviewed neighbors, and things like that, but I don't remember the specifics of his report.

Q Did John Bodnar have any input into this child protection team meeting other than what you've already told us about?

A No.

Q Now as I understand it, after everyone has their initial input, you then have a discussion in an attempt to reach some type of consensus on whether or not there was abuse, and if so, where are you going to go with this case?

A That's right.

Q Who participated in the discussion?

A Anybody who was in the room had the right to participate in that discussion.

Q I understand that, but who actually did?

A I remember that child protection team meeting. I remember Dr. Gehringer and Dr. DeRozier, Ann Kemmeter, Detective Nelson, John Bodnar, I remember them being very much involved in the discussion as trying to make some (p. 48) determination of abuse and legally what grounds we had to stand on.

Q Do you coordinate this discussion?

A Yes, I do.

Q All right. After everyone has their initial input, do you somehow ask yourselves an initial question of whether or not there is abuse?

A Yes.

Q Is that the first question you ask after everyone has the initial input?

A I will probably say to the group, "Can we say that this child has been physically abused."

Q And did you do that in this case?

A I believe I did.

Q And then procedurally how is that handled?

A The parties who are involved give their opinion.

Q Okay. Do you recall who in this case gave their opinion with respect to that question?

A Well, at that point I believe the consensus of opinion was that we have a child that has injuries that we cannot explain, but we also cannot explain how he got the injuries.

Q So you asked yourselves, "Can we say whether or not this child is abused," and the consensus was, "We don't know;" is that what you're telling me?

(p. 49) A I believe so, yes. We honestly can't say the child was abused at this point.

Q I think you said that each participant can voice their opinion with respect to that particular question; is that correct?

A Yes.

Q Do you recall whether or not—or strike that. Do you recall any opinion voiced by any of the specific participants?

A No, I do not, except for John Bodnar's response.

Q And you already told us what that was?

A That's right.

Q Now, after you decided that you really didn't know whether or not you had a case of child abuse here, is there a secondary question you address to the group?

A Following along with the philosophy that we have determining, "Is it safe for the child to return home," or, "What can be done to help the child," some of the information that came out was that Randy had indicated that he wanted some help with his son, and with that type of feeling it was really the recommendation of the team that voluntarily, if Randy would agree, the County Department of Social Services would supervise what was going on in the home, get the help that was needed to try to get the child to a Head Start program. And there was (p. 50) a recommendation to get Marie out of the house, try to get Marie out of the house, understanding that there is no legal way that the Department of Social Services or the Neenah Police Department or anybody else can force her out, it would be up to Randy to ask her to remove herself.

Q So you asked yourselves at that point in time whether or not it was safe, in your opinion, for the child to return home?

A Yes.

Q And was there a consensus of opinion with respect to that question?

A There was a consensus that the child could return home to the father and that there was not evidence to take it to court to remove the child from the home. Without having the evidence to remove the child from the home, what other alternative do you have.

Q Did anyone object to that particular opinion and say, "No, I think the child should be taken from the parent," or, "No, I don't think the child should be returned home"?

A I don't recall anybody voicing their opinion along that line.

Q Did you concur with the group consensus that the child should be returned to the father?

* * *

Exhibit C

(p. 3) PROCEEDINGS

KEITH L. NELSON, called as a witness herein by the Defendants, Winnebago County Department of Social Services, Winnebago County, Ann Kemmeter, and Cheryl Stelse, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. MINGO:

Q Would you state your full name for the record, please.

A Keith L. Nelson. Middle initial is L.

Q And what's your age?

A Thirty-nine.

Q Where do you presently reside?

A 610 Chestnut, City of Neenah.

Q And how are you employed at the present time?

A I'm employed by the City of Neenah Police Department in the capacity of patrol officer and detective.

Q Were you employed in that same capacity in January of 1983?

A Yes, I was.

Q What do your daily duties entail as a patrol officer for the City of Neenah?

A As a patrol officer on the afternoon shift or the day shift, our duties are going on emergency calls, writing citations, with the use of radar making speeding—stops

* * *

(p. 8) be in some other file?

A That's possible. I did not look for those today.

Q Okay. What was the first contact you had with Joshua DeShaney?

A Okay. Because of the time that elapsed, I'd like to refer to the complaint.

Q Sure. Feel free to refer to any of the—

A Okay.

Q —documents in that file at any time throughout this deposition.

A Okay. The first time I viewed Joshua DeShaney was on the 22nd of January, 1983, at around 3:55 p.m. in the emergency room.

Q At Theda Clark?

A At Theda Clark Hospital in Neenah.

Q Now, who contacted you?

A Theda Clark Hospital called at the request of Tom Hoare.

Q Would they have talked to you, or would they have talked to a dispatcher?

A They would have talked to a dispatcher first.

Q And then talked to you?

A And then talked to me.

Q And what information was relayed to you by telephone?

A It was—I believe that the dispatcher was requesting a detective to go to the hospital. And I recall that my

* * *

(p. 17) Q So you determined on your own that the surrounding neighbors couldn't see or hear anything; is that basically it, or did you knock on their doors and say, hey, could you see or hear anything with respect to the DeShaney family?

A No, I did not go beyond that building because it didn't seem logical that anyone could possibly hear or see what was going on.

Q Other than the postman that you talked to?

A Right.

Q Then after making your physical examination of Joshua, that's when you proceeded to take the photographs that you've told us about?

A Right.

Mr. Sullivan: Off the record.

(There was discussion off the record.)

BY MR. MINGO:

Q Okay. Then you spoke with Dr. Gehringer and Dan Venee, V-e-n-e-e?

A Yes.

Q And evidently you people agreed that the child's safety was in jeopardy, and temporary physical custody request was made?

A Right. I have children, and I just didn't believe from the marks on this child that it was normal. I have (p. 18) children with bruised up knees. I guess I have to relate to my own understanding of what child abuse could involve.

And my own kids have had bruises on their arms, and they have fallen on their knees, but I couldn't believe that this number of injuries should be normal, whether it was abuse or the child himself had some destructive qualities or problems, and I just felt that definitely he should be—have protection for his safety against whatever is causing this should be removed or monitored.

Q Okay. Did you have any input into whether or not temporary custody was taken of Joshua, or was that decided by the doctor and perhaps the social worker?

A A temporary custody form, the decision to take custody of a child has to be finalized by the Department of Social Services. I—I guess a police officer's opinion can sway what a social worker may do or do not do, but they have to make the final decision as to whether they want to sign that form. A police officer cannot take custody that I know of without their okay.

Q Okay. So it would have been the Department of Social Service worker Ann Kemmeter who made the final decision?

A Yes.

Q What I'm wondering is whether you had any input into that

* * *

(p. 45) because they're not relatives.

A relative is good to get information sometime, and then sometime they are not.

Q Okay.

A If they want to protect someone, they're not good.

Q So the next involvement you had with the case was on January 25th, 1983?

A That's right.

Q And that was at the child protective team meeting?

A At Theda Clark Hospital.

Q And Ann Kemmeter requested that you be present, correct?

A Right.

Q Have you attended—Strike that. Had you attended these type of team meetings in the past?

A No. It was new to me. It was the very first time I had been to a child protective team meeting.

Q Do you remember attending that team meeting?

A Yes, I do.

Q Now, your supplemental report indicates that you gave all information from your report; is that right?

A Yes.

Q Does that mean that you read your report to all the people present, just like you did to us today?

A I don't recall if I read it verbatim, but I do know that I produced the entire copy of what I had and the (p. 46) statements and brought it to the hospital.

And I assumed it was like any other hearing or meeting that everybody, to make a decision, should have all the information that you know of up until that point.

Q Did you orally speak at that meeting?

A I think I did.

Q And what would you have told the people at the team meeting?

A Again, I'll have to refer back to this report.

Q Okay.

A Because that time difference is back then. I attended the child protective team meeting at Theda Clark Hospital. I gave all information from my report. When it was all summarized, the end result from the ten to twelve people involved was that there would not be a specific—there would not be specific charges brought down.

I advised that this situation is in need of close supervision by the Department of Social Services and would hope an ongoing physical surveillance by the hospital and Social Services be started for Joshua.

All of my findings, I could not say, back up a specific charge as well as a hospital's and Department of Social Services'.

* * *

(p. 50) A Yes.

Q So you were working hand-in-hand with the Department of Social Services?

A We almost have to. In these type of cases I don't know how we can't. They sometimes learn things we have to know for a charge, and they back us up, and we have to do the same.

Q And then Joshua was released from temporary physical custody that day; is that correct?

A I'll have to read this again.

Q I'll withdraw the question, okay. I'll ask you another question.

A Okay.

Q Do you recall anything else that took place at this team meeting other than what you just told us about?

A Well, I'm going to have to again refer to the complaint. There may have been, but I can't recall more than I've documented back from that file.

I know—Well, I can say that at the meeting Dr. Gehringer was there and the ER nurse, I believe, was there.

Q Dr. Gehringer's the pediatrician?

A Um-hum.

Q That's yes?

A Yes.

(p. 51) Q Do you remember what Dr. Gehringer had to say at this team meeting?

A I'm going to have to go on—by memory on that.

Q What's your best memory as to what Dr. Gehringer said?

A My best recollection is that he couldn't determine what caused that injury to the forehead but that—here, again, it's just recollection—but there was some type of abrasive or scratching to the surface of the skin like—I don't know if my memory serves me right, but it seems to me there was mention of carpet, like if you would fall head first on a carpet, you'd get a burn from the carpet besides the bruise.

That—That seems to stick in my mind that his determination was that it's possible that the fall could be from like two or three feet up headfirst on to a carpet where not only would the bruise occur, but the skin would be burned or roughed up, abrased.

Q Do you recall anyone else being at the team meeting other than Dr. Gehringer.

A Well, Ann Kemmeter was present.

Q Do you remember a Dr. DeRozier, the clinical psychologist, being there?

A Yes, I do, I think he was.

Q Do you know Dr. DeRozier?

A I don't recall him. I wouldn't know what he looks like.

(p. 52) Q Do you recall anything that Dr. DeRozier said at the team meeting?

A I can't recall anything specific except that it may have had to do with Joshua's psychological setting. I think he had talked about the bruise on the penis. And there, again, I'm just—I'm trying to recall this, and I can't be sure.

Q Do you recall what any of the other participants at the team meeting had to say?

A No, back that far I can't really recall except that in—in light of all the participants, and I believe there was an agreement by everyone, that there needed to be some onging supervision and that no one could specifically, including the doctors, say exactly that this was something caused by either Randy or Joshua—or Marie.

Q Did anyone come out and say that this was definitely a case of abuse at the team meeting?

A Not that I recall. Not that I recall.

Q Did you have any further involvement with this case on January 25th, 1983?

A I don't believe so.

Q After January 25th of '83, did you have any contact with Joshua DeShaney, Marie DeShaney, Randy DeShaney, or any aspect of this case?

A No. I was advised by Ann that the Department of Social

• • •

Exhibit D

(p. 74) MR. YANKALA: I understand that.

MR. MINGO: Let's go off the record.

MELODY DESHANEY,

called for examination in behalf of Defendants, being first duly sworn, on her oath testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Yankala) My name is Wayne Yankala and I represent Defendants Winnebago County, Winnebago County Department of Social Services, Cheryl Stelse and Ann Kemmeter in a federal court case which your attorneys have started in the Eastern District of the State of Wisconsin. I will be asking you several questions today. If you don't understand my question, please say so and then I will rephrase it for you.

I want to caution you, you have to answer the questions verbally so the court reporter can take your response down. If at anytime you feel like you have to take a short break for some reason, just let me know and we will take a break, all right?

A. Okay.

Q. Would you state your full name and spell your last name for the record.

A. Melody Jean DeShaney, D E capital S H A N E Y.

• • •

(p. 75) couch and I stayed for a little while and I had to leave.

Q. Were you interested in having face-to-face contact with Chris to see, get a better understanding about her?

A. I don't think that was really in my mind at the time.

Q. So what you did, you took Joshua and dropped him off at your mother's and then just left?

A. I stayed for a little while when Dan brought the papers over, and they were going to be flying in that atfernoon or the next day, I really don't remember.

Q. Dan brought the papers over. Dan who?

A. Dan DeShaney, my uncle.

Q. And what papers did he bring over?

A. The modified divorce decree.

Q. And what did the modified divorce decree say concerning Joshua's custody?

A. The original one said that I would be allowed no visitation rights and I refused to sign it.

Q. Did the modified divorce decree change the legal custody with respect to Joshua from you to Randy DeShaney?

(p. 76) A. Yes.

Q. The first one that was drafted which would have changed legal custody to Randy had a clause or a paragraph in it which said you would not have any visitation rights?

A. Right.

Q. When did you first see that one?

A. Probably within an hour that I arrived in Cheyenne.

Q. Who brought that one over to you?

A. Uncle Dan.

Q. Do you know who drafted it?

A. I have no idea.

Q. Do you know how a second one came to be drafted?

A. Well, my mother told me that they sent it to me in Phoenix and I signed it and sent it back, but I honestly don't remember it.

Q. When you say they sent it, do you have any idea who may have sent it to you?

A. Probably Uncle Dan.

MR. SULLIVAN: Excuse me.

THE WITNESS: I don't really know.

MR. SULLIVAN: If you know the answer to a question, I want you to answer the question

• • •

(p. 89) A. That Melody J. DeShaney agrees to pay $150 a month child support.

Q. Did you in fact sign that then?

A. Yes.

Q. Did you make any child support payments?

A. Yes.

Q. Do you recall how many you made?

A. Every month until this happened to Josh.

Q. Where were those payments made to?

A. Clerk of the District Court, Winnebago County something, I just took it down to the cleark of the district court here and they sent it on.

(Deposition Exhibit A marked for identification.)

(Brief pause.)

Mr. Yankala: Let's go back on the record.

Q. (BY MR. YANKALA) Melody, I'm handing you what we have now had marked as Deposition Exhibit A for purposes of this deposition. Is this a copy of what you referred to as the amended or modified divorce decree you referred to earlier?

A. Yes.

Q. And this is the one that would transfer legal custody back to Randy DeShaney?

(p. 90) A. Correct.

Q. And it bears your signature?

A. Correct.

Q. That is your signature there?

A. Yeah.

Q. You apparently signed it on December 5th, 1980?

A. Yep, that's the one date I got right, the first week of December.

Q. You apparently were concerned about visitation rights, that's why you requested that that be included in the amendment to the divorce decree?

A. That's why I refused to sign the original one.

Q. Immediately, I shouldn't say immediately, but a short time after you transferred custody of Joshua back to Randy, you then went on the road with these two truck drivers you became involved with?

A. One truck driver, Swede.

Q. Okay. Swede?

A. Two months later.

Q. Okay. At that point you had moved out of your residence in Phoenix?

A. Yes.

Q. And you indicated you traveled around to

* * *

(p. 93) Q. Who did you write to?

A. Randy.

Q. What address did you write to him at?

A. Addresses that when my mother received calls from Randy or letters from Randy, the return addresses from there, there was always different addresses.

Q. You say when your mother received calls from Randy. Was Randy keeping contact with your mother during that period of time?

A. Occasionally, yes.

Q. Was he letting your mother know how things were going during that period of time?

A. Yes.

Q. Did he let your mother know where he was and where he could be contacted?

A. Sometimes.

Q. Can you tell me why he was keeping this contact with your mother and yet you had no direct contact with him during that period of time?

A. Because my mother and Randy had been friends when we were married, and he knew that if he ever needed anything, he could always call my mother.

Q. So you had obtained information from your mother about where to write to Randy?

* * *

(p. 96) Q. What would these letters say?

A. Thank you for the clothes, thank you for the visit, it was nice to see you, how is the weather, la-de-da, that was about it.

Q. Based on your last comment, I assume your mother went out to Wisconsin to visit with Chris and Randy?

A. Yes.

Q. When did that occur?

A. I have no idea. He was two and a half the first time, I believe.

Q. Your mother went out there more than one occasion?

A. Yes.

Q. Your mother didn't have any problems finding out where to go to see Joshua, did she?

A. No.

Q. Did you feel that Randy was trying to preclude you from seeing Joshua?

Mr. Sullivan: Excuse me, do you know what that means?

The Witness: That Randy was trying to stonewall me out of Joshua's life, yes.

Q. (BY MR. YANKALA) And what did you base that upon?

* * *

(p. 112) A. Bullshit.

Q. You don't believe it? Did you ever hear that before today?

A. No.

Q. Did you ever give Joshua any sort of sedative such as alcohol to calm him down when you had him?

A. Of course not.

Q. Do you know if your mother would do that?

A. Of course not.

Q. After Joshua's custody was legally transferred to Randy in December of 1980 and up until March 8th of

1984, had you ever requested that custody of Joshua be transferred back to you?

A. No.

Q. Now, you indicated that after you signed this second modification to the divorce decree concerning the child support payments, you in fact made support payments of $150 a month?

A. Yes.

Q. Did you ever send any additional money to Randy to help with respect to Joshua's care?

A. No.

Q. Did you ever send Joshua any gifts, birthday presents, things of that nature?

• • •

(p. 125) those states?

A. I was gone probably three months.

Q. How long did you stay with Greg Bauer?

A. A couple days.

Q. Did you make any attempts or did you try to schedule some sort of a visit with Joshua at anytime while Randy had custody of him before March 8th of 1984?

A. Yes.

Q. Tell me each and every attempt you made to schedule visitation with Joshua.

A. I was never in contact with Randy.

Q. I understand. Tell me all the attempts you made to schedule visitation.

A. Well, after all the attempts, probably 20 or 30 phone calls to his mother's house, whenever my mother received a letter with a different return address on it, I would write with no reply ever.

Q. Okay. I just want to be clear on this, I want you to understand. So you say your attempts to schedule a visitation or contact with Joshua consisted of 20 to 30 phone calls to Randy's mother?

A. Yes, at least.

Q. Were the purpose of each of those 20 or 30 phone calls to set up some sort of visitation with (p. 126) Joshua?

A. To at least find out where he was and how he was doing.

Q. I understand that. But were you calling her to try to set up a visitation with Joshua?

A. Yes.

Q. Each and every time?

A. Yes.

Q. And you also indicated you wrote letters?

A. Yes.

Q. Who did you write to now?

A. I wrote one or two to Chris and then that one I told you about previously when mom received the letter from Marie in February, and also when Randy sued me for

child support I had my attorney write him a threatening letter that I would at least like a phone number where I could call Josh every Sunday; and my attorney basically told me that there was not a whole lot of how to reinforce that. Maybe if he wrote him a threatening letter threatening legal action that maybe Randy would give me something, some kind of a number or something, and there was never any reply to that either.

Q. Okay. Just so I'm correct on all these letters. With respect to your attempts to try to set

• • •

(p. 132) phone calls or let his mother know. For awhile when I called I found out later that Joshua and Randy were living and sitting right there when I talked to his mother.

Q. When you talked to whose mother?

A. To Randy's mother.

Q. When did you talk to Randy's mother?

A. Many times. I don't remember when, it must have been after Chris and Randy were divorced and I later found out that when I had, a couple times when I had called Randy and Chris were living two or three blocks from Randy's mother; and she went down and told Chris that Melody just called, but I told her the usual that I don't know where you guys are.

Q. Twenty to thirty times you called Randy's mother and each time she said I don't know where Randy is?

A. Besides calling me filthy names and hanging up on me, yes.

Q. And that happened everytime you called for 20 or 30 times?

A. Everytime, one time I got ahold of Skip and he said if he saw Randy he would relay a message. One time I got ahold of a girl, Randy had stepbrothers and sister, stepsisters and I think it (p. 133) was a half sister and she said she had seen Randy but didn't know where he was at the time, if she saw him could she let him know that I had called.

Q. Did you ever tell your mother about your concerns? Apparently your mother had an ongoing relation with Randy as far as contacts. Did you ever tell her what your concern was?

A. My mother had went to see Josh and I knew that from her impression that he was being taken care of and he was okay.

Q. I understand that. But you have relayed to me that you had a desire to go see Joshua, and you had at least a feeling that Randy didn't want you to see Joshua. Did you ever bring that up to your mother and say talk to Randy, try to work something out?

A. Giving Josh up was a very vulnerable point with me, and my mom and I never really discussed anything like that.

Q. So it would be true that you never really discussed with your mother your concerns as far as you going to see Joshua and your impression that Randy was really against that?

A. I had mentioned it, you know, that I wasn't going to see Josh, but I knew that she had

* * *

EXHIBIT E

STATE OF WYOMING)
) SS:
COUNTY OF LARAMIE)

IN THE DISTRICT COURT
FIRST JUDICIAL DISTRICT

MELODY DeSHANEY,)
)
Plaintiff,)
)
vs.) Doc. 90 No. 153
)
RANDY A. DeSHANEY,)
)
Defendant.)

ORDER MODIFYING DIVORCE DECREE

(Filed January 23, 1981)

THE ABOVE-ENTITLED MATTER having come on before the Court this date upon stipulation of the parties to modify the decree entered herein, in the matter of child custody and visitation,

AND, good cause having been shown therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the sole care, custody, and control of the minor child of both parties, Joshua Eli, shall be relin-

quished by the Plaintiff and awarded to the Defendant; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff shall have the right of reasonable visitation, with reasonable notice to be provided to the Defendant and that Plaintiff shall keep Defendant informed of the child's location and phone number at such times; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff shall not have to make child support payments, at this time, but subject to the continuing jurisdiction to order child support at a later date, if appropriate; and

IT IS FINALLY ORDERED, ADJUDGED AND DECREED that the Plaintiff shall not remove the child from the state of the Defendant's and the child's residence while exercising visitation.

DATED this 15 day of December, 1980.

/s/ Joseph F. Maier
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

(Caption omitted in printing)

ORDER

(Filed January 29, 1986)

On October 23, 1985, defendants Winnebago County Department of Social Services, Winnebago County, Ann Kemmeter, and Cheryl Stelse moved this Court to dismiss for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), or alternatively, for judgment on the pleadings, Fed. R. Civ. P. 12(c). Both parties have presented matters outside the pleadings. The Court, therefore, intends to treat defendants' motion as one for summary judgment.

IT IS THEREFORE ORDERED that the parties shall have thirty (30) days from the date of this order to supplement their briefs by no more than fifteen (15) pages and to file any additional affidavits necessary to resolve the defendants' motion for summary judgment.

IT IS FURTHER ORDERED that the March 3, 1986, and March 10, 1986 trial dates and the February 21, 1986 pretrial conference are cancelled.

IT IS FURTHER ORDERED that trial is scheduled for Tuesday, May 27, 1986, at 9:30 a.m., and the pretrial conference is scheduled for Friday, May 9, 1986, at 9:00 a.m.

Dated at Milwaukee, Wisconsin, this 29th day of January, 1986.

BY THE COURT:

/s/ John W. Reynolds
John W. Reynolds
Chief Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

(Caption omitted in printing)

AFFIDAVIT

STATE OF WISCONSIN)
) SS
WINNEBAGO COUNTY)

CHERYL F. STELSE, being first duly sworn on oath, deposes and states as follows:

1. That she is an adult resident of the State of Wisconsin currently residing at 980 Betty Avenue, Neenah, Wisconsin 54956.

2. That affiant obtained a masters degree in social work in 1972 from the University of Wisconsin-Madison.

3. That affiant has been employed as the supervisor of the Child Protective Services Unit with the Winnebago County Department of Social Services in Oshkosh, Wisconsin since May of 1974.

4. That during the years 1983 and 1984, affiant was the immediate supervisor of Ann Kemmeter who was a case worker within the Child Protective Unit of the Winnebago County Department of Social Services.

5. That on January 22, 1983 Dr. Gehringer, a pediatrician, examined Joshua DeShaney at Theda Clark Regional Medical Center and recommended that the child be admitted to the hospital because of multiple contusions with possible child abuse.

6. That the referral of the Joshua DeShaney case to the Winnebago County Department of Social Services on

January 22, 1983 was pursuant to Section 48.891(3)(a) Wisconsin Statutes (1983).

7. That after being contacted on January 22, 1983, the Winnebago County Department of Social Services requested an intake worker at the Winnebago County Circuit Court to place temporary custody of Joshua DeShaney with the Theda Clark Regional Medical Center pursuant to Sections 48.205 and 48.207, Wisconsin Statutes (1983).

8. That the request for temporary protective custody with Theda Clark Regional Medical Center was granted by Dan Venne, Court intake worker, during the afternoon of January 22, 1983.

9. That an investigation of the January 22, 1983 referral was made by the Winnebago County Department of Social Services in conformity with Section 48.891(3)(c), Wisconsin Statutes (1983).

10. That Ann Kemmeter was the case worker within the Child Protective Unit of the Winnebago County Department of Social Services that was initially assigned to the Joshua DeShaney case.

11. That affiant's first personal involvement with the Joshua DeShaney case was on January 25, 1983 when affiant attended the child protective team meeting conducted at Theda Clark Regional Medical Center regarding the January 22, 1983 referral.

12. That the team involved in the January 25, 1983 meeting was a team created by Theda Clark Regional Medical Center.

13. That affiant attended the team meeting conducted on January 25, 1983 along with Ann Kemmeter, the case worker assigned to the case, Dr. Gehringer, a pediatrician who examined Joshua DeShaney, Dr. Derozier, a clinical psychologist who examined Joshua DeShaney, Tom Hoare, the social worker from Theda Clark Regional Medical Center, Keith Nelson, a Neenah Police Department detective, John Bodnar, Assistant Corporation Counsel for Winnebago County, along with various other hospital personnel.

14. That during the January 25, 1983 team meeting, the Joshua DeShaney case was discussed in detail and after said discussion John Bodnar, Assistant Corporation Counsel for Winnebago County, indicated that in his opinion there was not enough evidence to take the matter to Juvenile Court.

15. That on January 25, 1983 Assistant Corporation Counsel John Bodnar was the individual in Winnebago County in charge of commencing Court action in cases of suspected child abuse.

16. That as a result of the investigation and team meeting, the Winnebago County Department of Social Services filed a report with the State of Wisconsin pursuant to Section 48.981(3)(c)(3), Wisconsin Statutes (1983) stating that the report of suspected abuse was "unfounded."

17. That Joshua DeShaney was released to his father on January 25, 1983 upon the recommendation of the Theda Clark Regional Medical Center child protection team and with the concurrence of Assistant Corporation

Counsel John Bodnar who advised that the matter could not be pursued in Juvenile Court.

18. That on February 14, 1983 the Winnebago County Juvenile Intake Court closed the child protective case involving Joshua DeShaney.

19. That at all times after February 14, 1983 the involvement of the Winnebago County Department of Social Services with the DeShaney family was on a purely voluntary basis in a "family services" context.

20. That after February 14, 1983 and up to March 8, 1984 Randy DeShaney, the father of the minor, Joshua DeShaney, could have stopped any involvement or contact with the Winnebago County Department of Social Services at any point in time since said contacts were not pursuant to any Court imposed requirements or Court order.

21. That it was the practice of the Winnebago County Department of Social Services in January and February of 1983 to keep a specific voluntary family services case assigned to the worker that was originally involved in the case in the Child Protective Services Unit when the original referral was deemed to be "unfounded".

22. That after February 14, 1983 the case worker, Ann Kemmeter, was involved with providing family services on a voluntary basis to the DeShaney family up to the alleged incident of March 8, 1984.

23. That during the period that affiant was providing voluntary services to the DeShaney family prior to March 8, 1984, it was the policy of the Winnebago County Department of Social Services that a case worker should make one attempted home visit per month on any open family services case.

24. That as the immediate supervisor of case worker, Ann Kemmeter, affiant met with Ann Kemmeter every two weeks to discuss Ann Kemmeter's ongoing cases including the DeShaney case.

25. That affiant agreed with the way case worker, Ann Kemmeter, had handled the DeShaney case at all times.

26. That at no time during the Winnebago County Department of Social Services voluntary involvement with the DeShaney family did affiant feel that a referral was made to the Winnebago County Department of Social Services under Section 48.981 Wisconsin Statutes because of suspected abuse or neglect of Joshua DeShaney.

27. That at no time during the Winnebago County Department of Social Services voluntary involvement with the DeShaney family did affiant feel that any information was forwarded to the Winnebago County Department of Social Services that constituted a Section 48.981 Wisconsin Statutes referral.

28. That at no time after the January 25, 1983 team meeting and prior to March 8, 1984 did affiant ever feel that there was sufficient evidence or facts pertaining to Joshua DeShaney to take the Joshua DeShaney matter to the Assistant Corporation Counsel John Bodnar for a referral in the Court.

29. That at no time did affiant ever intentionally refuse to offer voluntary services or intentionally fail to comply with any provisions of Chapter 48 of the Wisconsin Statutes.

/s/ Cheryl F. Stelse
CHERYL STELSE

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

(Caption omitted in printing)

AFFIDAVIT

STATE OF WISCONSIN)
) SS
WINNEBAGO COUNTY)

JOHN BODNAR, being first duly sworn on oath, deposes and states as follows:

1. That affiant is an adult resident of the State of Wisconsin currently residing at 538 Madison, Oshkosh, Wisconsin 54901.

2. That he is an attorney licensed to practice law in the State of Wisconsin and is presently an Assistant Corporation Counsel for Winnebago County in the State of Wisconsin.

3. That affiant has been an Assistant Corporation Counsel for Winnebago County since November of 1981.

4. That in January of 1983 affiant was the attorney for Winnebago County that was primarily involved in Juvenile Court matters and specifically in filing petitions with the Winnebago County Circuit Court under Section 48.25 Wisconsin Statutes (1983) seeking jurisdiction in cases involving children alleged to be in need of protection or services under Section 48.13 Wisconsin Statutes (1983).

5. That in affiant's capacity as an Assistant Corporation Counsel, affiant attended a child protection team meeting on January 25, 1983 conducted at Theda Clark

Regional Medical Center in Neenah, Wisconsin involving a possible child abuse referral concerning the minor, Joshua DeShaney.

6. That also in attendance at the January 25, 1983 child protection team meeting were Ann Kemmeter, a case worker in the Child Protective Unit of the Winnebago County Department of Social Services, Cheryl Stelse, Ann Kemmeter's supervisor, Dr. Gehringer, a pediatrician who examined Joshua DeShaney, Dr. DeRozier, a clinical psychologist who examined Joshua DeShaney, Tom Hoare, the social worker from Theda Clark Regional Medical Center, Keith Nelson, a Neenah Police Department detective, and various other hospital personnel.

7. That the pediatrician present at the team meeting, Dr. Gehringer, was the physician that examined the child on January 22, 1983 and recommended the child be admitted to the hospital because of multiple contusions with possible child abuse.

8. That after hearing the discussions at the January 25, 1983 team meeting and after specifically questioning the pediatrician, Dr. Gehringer, affiant advised all present at the team meeting that it was his legal opinion that there was not enough evidence under Section 48.13(3) Wisconsin Statutes (1983) to bring the matter into the Winnebago County Juvenile Court.

9. That affiant has reviewed all of the information and facts assembled by the Winnebago County Department of Social Services from January 25, 1983 up to the alleged incident of March 8, 1984 and it is affiant's legal opinion that at no point was there sufficient information or facts presented to the Winnebago County Department of Social

Services to pursue the Joshua DeShaney case in Juvenile Court under Section 48.13(3) Wisconsin Statutes. That it is your affiant, as Assistant Corporation Counsel for Winnebago County, who is charged with filing a petition under Chapter 48 Wisconsin Statutes seeking jurisdiction in cases involving children alleged to be in need of protection or services under Section 48.13 Wisconsin Statutes (1983).

/s/ John Bodnar
JOHN BODNAR

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

(Caption omitted in printing)

AFFIDAVIT

STATE OF WISCONSIN)
) SS
WINNEBAGO COUNTY)

ANN KEMMETER, being first duly sworn on oath, deposes and states as follows:

1. That affiant is an adult resident of the State of Wisconsin currently residing at 421 Twelfth Street, Neenah, Wisconsin 54956.

2. That affiant is presently employed by the Winnebago County Department of Social Services.

3. That affiant has worked for the Winnebago County Department of Social Services as a member of the Child Protection Service Unit since September 11, 1967.

4. That affiant's first involvement with the Joshua DeShaney case was on January 22, 1983 at which time affiant was contacted by Tom Hoare, social worker at Theda Clark Regional Medical Center, located in Neenah, Wisconsin.

5. That on January 22, 1983 Dr. Gehringer, a pediatrician, examined Joshua DeShaney at Theda Clark Regional Medical Center and recommended that the child be admitted to the hospital because of multiple contusions with possible child abuse.

6. That the referral of the Joshua DeShaney case to the Winnebago County Department of Social Services

on January 22, 1983 was pursuant to Section 48.891(3)(a) Wisconsin Statutes (1983).

7. That after being contacted on January 22, 1983, the Winnebago County Department of Social Services requested an intake worker at the Winnebago County Circuit Court to place temporary custody of Joshua DeShaney with Theda Clark Regional Medical Center pursuant to Sections 48.205 and 48.207, Wisconsin Statutes (1983).

8. That the request for temporary protective custody with Theda Clark Regional Medical Center was granted by Dan Venne, Court intake worker, during the afternoon of January 22, 1983.

9. That an investigation of the January 22, 1983 referral was made by the Winnebago County Department of Social Services in conformity with Section 48.891(3)(c), Wisconsin Statutes (1983).

10. That on January 25, 1983 a child protective team meeting was conducted at the Theda Clark Regional Medical Center regarding the January 22, 1983 referral.

11. That the team involved in the January 25, 1983 meeting was a team created by Theda Clark Regional Medical Center.

12. That affiant attended the team meeting conducted on January 25, 1983 along with Dr. Gehringer, a pediatrician who examined Joshua DeShaney, Dr. DeRozier, a clinical psychologist who examined Joshua DeShaney, Tom Hoare, the hospital social worker, Cheryl Stelse, affiant's supervisor, John Bodnar, Assistant Corporation Counsel for Winnebago County, and Keith Nelson, Neenah Police Department detective, along with various other hospital personnel.

11. That during the January 25, 1983 team meeting, the Joshua DeShaney case was discussed in detail and that after said discussion John Bodnar, Assistant Corporation Counsel for Winnebago County, indicated that in his opinion there was not enough evidence to take the matter into Juvenile Court.

14. That on January 25, 1983 Assistant Corporation Counsel John Bodnar was the individual in Winnebago County in charge of Commencing Court action in cases of suspected child abuse.

15. That as a result of the investigation and team meeting, the Winnebago County Department of Social Services filed a report with the State of Wisconsin pursuant to Section 48.981(3)(c)(3), Wisconsin Statutes (1983) stating that the report of suspected abuse was "unfounded".

16. That Joshua DeShaney was released to his father on January 25, 1983 upon the recommendation of the Theda Clark child protection team and with the concurrence of Assistant Corporation Counsel John Bodnar who advised that the matter could not be pursued in Juvenile Court.

17. That on February 14, 1983 the Winnebago County Juvenile Intake Court closed the child protective case involving Joshua DeShaney.

18. That at all times after February 14, 1983 the involvement of the Winnebago County Department of

Social Services with the DeShaney family was on a purely voluntary basis in a "family services" context.

19. That after February 14, 1983 and up to March 8, 1984 Randy DeShaney, the father of the minor, Joshua DeShaney, could have stopped any involvement or contact with the Winnebago County Department of Social Services at any point in time since said contacts were not pursuant to any Court imposed requirements or Court Order.

20. That it was the practice of the Winnebago County Department of Social Services in January and February of 1983 to keep a specific voluntary family services case assigned to the worker that was originally involved in the case in the Child Protective Services Unit when the original referral was deemed to be "unfounded".

21. That after February 14, 1983 affiant was involved with providing family services on a voluntary basis to the DeShaney family for approximately 13 months prior to the alleged incident of March 8, 1984.

22. That during the period that affiant was providing voluntary services to the DeShaney family prior to March 8, 1984, it was the policy of the Winnebago County Department of Social Services that a case worker should make one attempted home visit per month on any open family services case.

23. That during the period of time that affiant was working with the DeShaney family on a voluntary family services basis, affiant made approximately 12 home visits to the DeShaney residence.

24. That during the period of time that affiant was working with the DeShaney family on a voluntary family services basis, affiant made approximately 5 attempted home visits to the DeShaney residence.

25. That during the home visits to the DeShaney family, affiant tried to maintain her relationship with the DeShaney family and worked with the family on such things as parenting and disciplinary techniques in addition to observing the children in the family when circumstances permitted.

26. That no time during affiant's voluntary involvement with the DeShaney family did affiant feel that a referral was made to the Winnebago County Department of Social Services under Section 48.981 Wisconsin Statutes because of suspected abuse or neglect of Joshua DeShaney.

27. That at no time during affiant's voluntary involvement with the DeShaney family did affiant feel that any information was forwarded to the Winnebago County Department of Social Services that constituted a Section 48.981 Wisconsin Statutes referral.

28. That at no time after the January 25, 1983 team meeting and prior to March 8, 1984 did affiant ever feel that there was sufficient evidence or facts pertaining to Joshua DeShaney to take the Joshua DeShaney matter to Assistant Corporation Counsel John Bodnar for a referral into Court.

29. That at no time did affiant ever intentionally refuse to offer voluntary services or intentionally fail

to comply with any provisions of Chapter 48 of the Wisconsin Statutes.

/s/ Ann Kemmeter

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

(Caption omitted in printing)

PLAINTIFFS' REPLY BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Text of brief omitted in printing.)

Dated this 19th day of March, 1986.

JOSHUA DESHANEY and MELODY DESHANEY, Plaintiffs

/s/ By: Donald J. Sullivan, Esq.
Donald J. Sullivan, Esq.
P.O. Box 1854
Cheyenne, WY 82003
(307) 634-0112

and

Curry First, Esq.
PERRY, FIRST, REIHER, LERNER & QUINDEL, S.C.
1211 N. Cass St.
Milwaukee, WI 53202

(Certificate of service omitted in printing)

ATTACHMENT "A"

1. Defendants had a direct statutory duty to protect children from abuse.

See Wisconsin Statutes Sec. 48.981 et seq.

2. Defendants were assigned specifically to child protection.

See Kemmeter deposition, Vol. I, p. 29; Kemmeter deposition, Vol. IV, pp. 48, 50. Feakes deposition, p. 30.

3. Defendants were relieved from any other duties except for child protection.

See Kemmeter deposition, Vol. I, p. 29; Kemmeter deposition, Vol. IV, pp. 48, 50. Feakes deposition, p. 30.

4. Defendants were actually and directly involved with the individual child—defendants actually knew the name, address, age, birth date, parentage, family history, IQ, and other personal details of Joshua.

See Kemmeter deposition generally; see also narrative case summary (18 pages) described therein, attached as Attachment G hereto; Petition for Determination of Status (9 pages) signed by Kemmeter and described in her deposition, attached as Attachment H hereto; Donald DeRozier, Ph.D., deposition; Feakes and Stelse depositions.

5. Defendants opened a case file on Joshua DeShaney.

See materials described at #4 above.

6. Defendants convened a Child Protection Team meeting relative to Joshua (and attended and participated).

See Kemmeter deposition, Vol. II, pp. 154-155; Stelse deposition, Vol. I, p. 104; Kemmeter affidavit, para. 12; Stelse affidovit, para. 11.

7. Defendants actually drafted a social services contract for the protection of Joshua.

See Kemmeter depositions, Vol I, pp. 70-72; and narrative case summary Attachment G.

8. Defendants affirmatively set out to protect Joshua and determine what actions would be in his best interests.

See Kemmeter deposition, Vol. II, pp. 73, 164.

9. Defendants actually received and read repeated emergency room records on Joshua and his physical/abuse status.

Kemmeter deposition, Vol. II, pp. 5, 6, 7, 14, 15, 36, 37, 38, 141, etc.

10. Defendants spoke personally and by telephone with at least two different hospital social workers soliciting information about Joshua.

Kemmeter deposition Vol. II, pp. 36-37; Vol. iv, pp. 102-103.

11. Defendants accepted Joshua as a "client" in their Child Protection Service.

See Kemmeter deposition generally and narrative case summary, Attachment G.

12. Defendants held meetings between the case worker and the supervisor to review Joshua's status and determine what action was called for.

See Kemmeter deposition, Vol. II, p. 80; Stelse deposition, Vol. I, pp. 107 through 116.

13. Defendants at least twice reviewed the social services contract to consider updating it and wrote and reviewed memoranda documenting their contacts with Joshua and their efforts to protect him.

See Stelse deposition, Vol. I, p. 115, and narrative case summary, Attachment G.

14. Defendants were placed on specific written notice that Joshua was in danger of abuse fully a year before the first Child Protection Team meeting in January 1983.

See Peter Donner deposition, pp. 6-8. See also Neenah P.D. Complaint documenting Joshua as being "a prime case for child abuse," bearing datestamp of Winnebago County DSS January 27, 1982, attached hereto as Attachment I. See also Kemmeter deposition, Vol. II, p. 45.

15. Defendants maintained a formal policy of visiting Joshua a minimum of one time a month and defendants made attempts to visit Joshua at home at least one time a month.

See Kemmeter deposition, Vol. I, pp. 57, 74; Feakes deposition p. 66.

16. Defendants in fact visited Joshua in his home and made a total of approximately 19 visits to his home for the purpose of checking on his abuse status.

See Kemmeter deposition, Vol. IV, pp. 115-116, and Kemmeter affidavit, para. 23, 24.

17. Defendant Kemmeter physically held Joshua on her lap, read stories to him, and testified that she had a personal relationship with him and that she was very fond of him and that he was very fond of her.

See Kemmeter deposition, Vol. III, pp. 44-47, 49, 50.

18. Defendants tried to have Joshua enrolled in Head Start, to provide him with an independent adult observer who could watch for fresh signs of child abuse.

See Kemmeter deposition, Vol. IV, pp. 24, 44-45; Ruth Davis deposition, pp. 17, 38.

19. Defendants had the legal power and authority to intervene in Joshua's situation and seek temporary or permanent protective custody for his protection. Defendants ALONE had this power and authority (as opposed to all law enforcement officers, e.g.).

See Wisconsin statutes Sec. 48.981 et seq.

20. There was no other entity or agency in Oshkosh or Winnebago County which had the power to intervene to bring Joshua's plight to the attention of a court or seek or obtain temporary protective custody.

See Wisconsin statutes Sec. 48.981 et seq.

21. Defendants did in fact seek and seize temporary physical custody of Joshua, in January 1983, upon the basis of physical evidence of child abuse.

See Kemmeter deposition, Vol. III, p. 17, Vol. V, pp. 51-52.

22. Joshua was a minor and in fact a three- and four-year old child, during the time at issue, and was

therefor physically, mentally, socially, and economically absolutely powerless to take any action at all for his own protection; indeed, as a toddler he was unable to realize that his situation was other than normal, was not his own fault, and was not deserved. Abundant evidence at trial will establish that abused children, in fact, typically believe that their own survival requires that they protect and love their abuser.

See Kemmeter deposition, generally; and Dr. Richard Krugman, M.D., and Stephen Bavolek, Ph.D., depositions regarding survival tactics of abused children.

23. Defendants actively managed a casefile on Joshua from January 22, 1983 through the time he was beaten into brain damage and vegetative state on March 8, 1984, a total of fifteen (15) months. During that time they had a total of twenty-three (23) caseworker contacts with Joshua and/or his family at his home, plus untold numbers of other contacts with hospital social workers, Head Start workers, and police officers on his behalf. During that time, also, they conducted approximately thirty (30) supervisory conferences at which Joshua's case was on the list of items to be reviewed.

See Kemmeter and Stelse depositions, cited above, and narrative case summary, Attachment G.

ATTACHMENT "B"

The grandmother testified as follows:

"Q. Did you ever talk with Ann Kemmeter?

A. Yes.

Q. When did you talk with Ann Kemmeter?

A. Melody and I went to her office that day.

Q. What did she say to you both at that time?

A. She said there was a file of child abuse on Joshua, and I will never forget when she got done she says, "*I just knew the phone would ring some day and Joshua would be dead.*" And she never did nothing to help him. She didn't even call us or nothing." (Myrna Bridgewater deposition, page 74, lines 13-23). (emphasis added).

ATTACHMENT "C"

Melody DeShaney testified as follows:

"What did she tell you?

A. She told me about all the times that Joshua had been taken to the hospital.

Q. Told about the various emergency room visits?

A. Yes.

Q. Did she say anything else to you?

A. *She said that she knew one day she was going to get a phone call and that Joshua was going to be dead.*

Q. Is that exactly what she said?

A. That's exactly what she said. I will never forget it." (Melody DeShaney deposition, page 141, lines 8-20). (emphasis added).

ATTACHMENT "D"

Ann Kemmeter testified as follows:

"Q. What was your reason for asking for a teammate on Joshua's case?

A. Primarily because of the number of accidents that Joshua had.

Q. What do you mean?

A. There were on several occasions when I made home visits to the home that indicated—one of May 2nd where he had a bump on his forehead, one indicated he had this abrasion, scrape on his chin in November, there were several other occasions that Joshua had bumps, lacerations on him.

Q. Did those—I take it from the fact that you singled this one case out to get teaming, I take it that you're telling us that you were not comfortable with the explanations that the adults were giving you for these various bumps and lacerations and so on?

A. I was concerned with the number of bumps and bruises, lacerations, that Joshua had, yes.

Q. Okay. Were you dubious or skeptical about the explanations you were getting from the adults?

A. At the time I requested a worker join me on this, it was more that—because of the numerous occasions that

I would be there when I would note bumps and bruises —not bruises, correction, it was bumps, lacerations, or the family had shared with me that the child had been at the emergency room. So I began to be concerned as to what really was happening in this family.

Q. Were you concerned that these were the psysical indicia of child abuse?

A. I was concerned whether it was child abuse or whether this was simply a child that was accident prone.

Q. Did you suspicion one way or the other at the time that you asked to have somebody team with you?

A. I was concerned enough that I requested that another worker join me on the case.

Q. My question is at that point, were you suspicious that this was a child abuse case?

A. Yes.

(Kemmeter deposition, Vol. I, pages 120-121).

ATTACHMENT "E"

Christine Howe Feakes testified as follows:

"Q. Did she indicate to you that she was suspicious about child abuse—

A. Yes.

Q. —Of Josh? And was that at the beginning of your involvement?

A. Yes."

(Christine Howe Feages deposition, p. 33, lines 14-19).

ATTACHMENT "F"

Christine Howe Feakes testified as follows:

"Q. Okay. Did she tell you that the file was being followed in this department as a child abuse file?

A. It was part of our unit. It was—Ann was a worker in our unit. Therefore, the cases in our unit—it was a child protective services case.

Q. By the fact it's there, you know it's one where you try to protect a little kid?

A. Correct."

(Feakes deposition, page 30, lines 12-19).

ATTACHMENT "G"

DE SHANEY, Joshua E. FS-17576 CW

CURRENT INFORMATION:

Client Name: Joshua E. DeShaney; FS 17576 SW

CONTACTS:

1/22/83, 1/24/83, 1/25/83, 1/27/82 [sic]—appointment cancelled; 2/2/83, 2/4/83, 3/8/83.

PROBLEM DESCRIPTION

Joshua DeShaney was admitted to Theda Clark Regional Medical Center on Saturday, January 22, 1983 at 1:34 p.m. by his primary caretaker and aunt, Marie DeShaney, stating that another child of approximately two years of age struck Joshua on the forehead with a metal truck. Joshua

had a bruise approximately three inches in diameter across the forehead, with a textured pattern on the surface. There was another blue bruise on her [sic] right cheek, along with an abrasion, a small abrasion on the back of his head, a bruise the size of a 50 cent piece on the left scalp, smaller bruises on his spine and arms. Several of these had dotted textured patterns to the bruises. Joshua also had bruises on his arms and legs and a bruise across both buttocks, upper thighs and ankle and heel. Dr. Gehringer, Pediatrician from the Nicolet Clinic, examined the child and recommended that the child be admitted to the hospital because of the multiple contusions with possible child abuse. Tom Hoare, social worker at Theda Clark Regional Medical Center, contacted me, as well as the Neenah Police Department, Detective Keith Nelson, to assist in the investigation. The father of the child was out ice fishing and, therefore, unable to give immediate consent for the child to be hospitalized. We requested him for a physical custody for placement at Theda Clark Regional Medical Center, which was granted by Dan Venne, Intake Worker, at approximately 4:15 p.m. in the afternoon.

Complete statements from Marie DeShaney, the primary caretaker, and of Randy DeShaney, birth father, were taken by Detective Nelson that same afternoon in my presence. A copy of their statements, as well as the report from Detective Nelson are attached in the record. Basically, even though the two did not have time to corroborate their stories, they appeared to be in agreement regarding Joshua's behavior and the types of disciplinary techniques used for the child, and expectations of the child. Both of them denied abusing the child and, further, both stated they had intentions of contacting the pediatri-

cian from Nicolet Clinic on Monday, January 5, to make an appointment for a complete physical for Joshua because of the extensive bruises on his body and the fact that they were not healing very quickly. Detective Nelson and myself found Marie DeShaney and Randy Deshaney to be very cooperative in the sharing of information.

On Monday, January 24, Tom Hoare, social worker from the hospital, and myself again interviewed Randy DeShaney, Marie DeShaney, and Randy's ex-wife, Christine. Once again all three were very cooperative and open in sharing information with us, and there appeared to be no basis to the establishment of child abuse or neglect. Rather, it appeared they were lacking in parenting skills and may not have provided adequate supervision to Joshua and two other children Marie takes care of, her son, Rusty, and a 3-year-old child by the name of Andy. Andy is the son of Claudette Goetsch. Detective Nelson also interviewed neighbors of the DeShaneys who share the same apartment building, with their responses being that while they hear crying and hear fighting, they do not hear any slapping or constant screaming, so as to indicate that a child was in danger. Both Marie and Randy also felt that Joshua's behavior has been deteriorating for the last month and one-half with more eneuresis and encopresis. He seems to play rougher and will pull his hair out of his head, especially when father is leaving. They are two bald spots on each side of the child's head, about two inches in diameter. Both Marie and Randy also indicate the child is biting himself and pinching himself. In view of the information, a request was made for a complete psychological exam to be completed by Dr. Donald Derozier.

On Tuesday, January 25, a child protection team meeting was held at the emergency room in Pediatrics, along with Dr. Derozier, Clinical Psychologist, Dr. Gehringer, Pediatrician, Tom Hoare, social worker, Cheryl Stelse, Supervisor, Child Protective Service Unit, John Bodnar, Assistant Corporation Counsel for Winnebago County, Detective Keith Nelson, of the Neenah Police Department, and myself. Dr. Gehringer reported that Joshua's past medical history is pretty normal and that his immunizations are all up to date. Dr. Derozier noted that the father was pretty attentive to Joshua, he also said that Randy has said that he feels Marie abuses the child. Randy may have had a drinking problem in the past. Randy's mother was out of the house when Randy was one. Randy's father is an alcoholic. Also noted, a bruise was also found on Joshua's penis. This bruise cannot be explained by either Randy or Marie. It was thought to look like a pinch. Detective Nelson, who had gone to the DeShaney home, indicated it did not look like the truck which Marie stated caused the bruise on Joshua's forehead could have caused the bruising. He felt the bruise on Joshua's forehead looks like something you would get from falling on a floor or running into a wall. It was the recommendation of the child protection team that the child be returned to the father, that he live independently of the primary caretaker, Marie DeShaney, the child be enrolled in a preschool program, preferably Headstart, and that the father continue to work with the department to increase his knowledge of child development as well as to increase his parenting skills. Randy entered into a social service agreement, indicating that he would be more than happy to cooperate with the department and would be accepting of any and all help that would be made available to him.

Dr. Gehringer would like to continue to follow this child for the next several months for an indefinite period of time.

It was requested that Winnebago County Juvenile Court Intake to dismiss the temporary physical custody order and any further allegations against the family at this time because of lack of ability to substantiate any abuse or neglect. Joshua was released from the hospital on the 25th and returned to the home of the father. Also attached in the record is the report from the child protection team, copies of check with medical records from that hospitalization, as well as the psychological report completed by Dr. Derozier.

Following Joshua's discharge from the hospital, I had met with Randy once in the office and made a home visit on 2/4/83. Randy was not present for the home visit, although Marie was present. Joshua did not have any further bruises on him and looked good. His eyes were still black and blue from the bump on the forehead, but these were also disipating. Randy, apparently, was helping his aunt, Sandra VanHugan, move back to Fond du Lac, Wisconsin. They would be leaving that weekend to spend approximately two weeks in Custer, Wisconsin, just South of Stevens Point, with Randy's father. Randy was to contact me upon his return. An appointment has been made for me to meet with Randy and Joshua at their Wright Avenue address on 3/8/83.

Goal—PROTECTION

Primary Objective—RESOLUTION OF ABUSE, NEGLECT, OR EXPLOITATION

Service Area—INDIVIDUAL AND FAMILY ADJUSTMENT

Role—COUNSELING

I will continue to provide counseling services to Randy to improve his knowledge of child development and parenting skills.

Service Area—EDUCATION

Role—ADVOCATE

I will advocate either a pre-school or Headstart Program, in which Joshua could participate to improve his intellectual and social skills.

Service Area—EMPLOYMENT RELATED

I will advocate full-time employment for Randy in having him explore possible job opportunities. He is presently exploring the possibility of employment in Florida, although nothing has materialized to date.

Service Area—HEALTH RELATED

I will advocate sound health care practices for Joshua and monitor to be sure that he gets in for his bi-monthly exams with Dr. Gehringer.

INITIAL SERVICE PLAN—Established 1/25/83

FINANCIAL INFORMATION:

The services this client is to receive are fee exempt.

Dictated 3/7/83 A. KEMMETER/fl Transcribed 3/17/83

Client Name: Joshua E. DeShaney; FS-17576 CW

SOCIAL SERVICE PLAN REVIEW—7/25/83

CONTACT DATES:

1/22, 1/25, 1/24—all at Theda Clark Regional Medical Center; 2/2—home visit; 2/4—home visit; 3/8—home visit; 3/25—home visit, 4/28—appointment cancelled; Randy was out of town; 5/2—home visit; 5/24, 6/10—appointment cancelled—the DeShaneys were moving to Oshkosh; 7:13—home visit.

During the past six months, little has changed within this household except the family has now moved to Oshkosh, renting a small two-bedroom home at 34 Tennessee Avenue. Randy had, at one time, felt it would be in Joshua's best interest if he and Marie no longer lived together. Randy, apparently, changed his mind as he and Marie, along with her son, Rusty, and Joshua continue to reside as a family unit. Both Randy and Marie feel that there is some improvement in their relationships since they have moved away from the Tupper family in Neenah. Both also feel that it was Andy, Joshua's playmate, who caused much of Joshua's bruising and lacerations.

I still have some concern about the number of accidents Joshua has. On 3/15/83, I received a phone call from Tom Hoare, social worker at Theda Clark Regional Medical Center. Joshua had been at the emergency room the day before with a laceration to his forehead. Joshua, allegedly, fell—leaving the mark. There was no evidence of actual child abuse. Again on May 2, at my home visit, Joshua had a bump on his forehead, at which time he allegedly fell off of his tricycle. Some of these accounts are feasible, and while they are not major injuries—there is enough of the accident-prone syndrome present for me to continue to want to follow this family for while [sic].

Randy continues to look for full-time employment, and at one point, spent several weeks away from Marie, Joshua, and Rusty in order to drive truck with his father. His father lives in Stevens Point, and apparently has a trucking business. I am aware that Randy spent some time in Florida, as well as Texas. Randy continues to search actively in the Oshkosh area for full-time employment.

In Randy's spare time he does a lot of fishing, and he has more recently taken Joshua with him on his fishing excursions. In general, Randy seems to be more attentive to Joshua, with a noted behavioral improvement. I continue to be concerned, however, that their expectations of Joshua exceed his chronological age. Example: Joshua continues to get up in the morning and make his own bed and will go to the kitchen and prepare himself a peanut butter sandwich without assistance. Randy states that they are not forcing him to do some of these higher level expectations, but that Joshua is willing and wanting to. On my last visit, we discussed possible involvement of Joshua in the Headstart Program in order that his socialization skills would increase, as well as to receive further stimulation for learning. Randy was going to contact the Headstart Program in Oshkosh for possible enrollment of Joshua.

Basically, the DeShaneys continue to remain cooperative and appear to be honest in discussing Joshua's behavior and his accidents. I will continue to monitor this family for another six months, to monitor the accidents, as well as to suggest service areas which may be in their best interest.

NEW SERVICE PLAN—7/25/83

CONTRACT

Same service plan continued.

FINANCIAL INFORMATION:

The services this client are to receive are fee exempt.

Dictated 7/26/83 A. KEMMETER/fl Transcribed 8/8/83
Social Service Plan Review Date/ 1/25/84

Client Name: Joshua DeShaney; FS-17576 CW

SOCIAL SERVICE PLAN REVIEW—1/25/84

AGENCY CONTACTS:

7/28, 8/17—not home; 8/24, 9/21, 10/12, 10/19, 11/9, 11/16, 12/2—not home; 12/7, 1/10/84—conference with Ruth Davis, of Headstart, and 1/18—home visit.

PLAN REVIEW:

I continue to have a great deal of concern over the welfare of Joshua. Both Randy and Marie continue to have high expectations of Joshua, some that he is unable to obtain and, therefore, receives at least verbal threats from Marie and Randy. In addition, there continues to be a number of accidents happening—which arouse my suspicion. On 9/21, when I arrived at the home—I learned that they had Joshua into the emergency room as he and Marie were in the kitchen when allegedly Joshua grabbed the liquid detergent for doing dishes, squeezing the bottle—resulting in soap in his eye and ultimately ending up with a scratched cornea. Again on October 19, Joshua had a bump on his left forehead; 11/9—a scraped chin that to me appeared to look like a cigarette burn, and 1/18—Joshua was in bed with the flu and I did not have an opportunity to see him. As of November, Chris Howe has joined me in monitoring

this case and Ruth Davis, from the Headstart Program, has continued to attempt contact with this family—primarily in order to make Joshua more visible to community resources in order to assist in-monitoring his numerous "accidents".

Marie and Randy have had numerous fights, most occurring during the month of November. The police reports are attached in the record. During these fights, there was not only verbal abuse to Marie, but there was also physical violence, resulting in a very badly bruised eye for Marie. Marie and Randy had separated for a time, although he is now back living with Marie and feel things are going much better.

Ruth Davis, of Headstart, has attempted to make innumerable contacts for Joshua in order that he could enter the Headstart Program. It had been very difficult for Marie to locate the family, as Randy had spent a great deal of time in the Stevens Point area visiting his father. When she was finally able to make contact, the family was initially willing to allow Joshua to participate in their school program. The family changed their mind, however, when Ruth Davis reported to the department and documented it in writing (see attached letter in the record) that on January 9, 1984, when Ruth stopped by their home—she found Joshua left alone. Ruth feels that this may have frightened the family away in view of this report. Although the family is saying no to Joshua's participation in the Headstart Program at this time, Ruth will continue to attempt contact with them to see if they reverse their decision. I strongly feel that the program would benefit Joshua by providing him with the academic stimulation, as well as social skills he is in need of. Joshua will, however, be old

enough to begin kindergarten this fall should the Head-start Program be rejected by the family.

It should be noted there is one additional new report from Mercy Medical Center of November 30, 1983, when Joshua was seen as an outpatient for a laceration on his right forehead, with blood in the left nostril, the left ear red and swollen and petekia on the left and right shoulders. Allegedly, Joshua had fallen in the bathroom—hitting his head on the toilet. Randy was confronted regarding this concern, and again denied that it was anything other than an accident.

My primary concern with this family continues to remain the innumerable accidents that Joshua has suffered, which I seriously question as simply as a child being accident prone. In addition, I am concerned about the physical fighting that occurs within the home, especially towards Marie. I am not certain who the abuser of Joshua would be; however, I cannot help but hypothize the the probability of Randy becoming upset with Marie—using physical violence, and Marie not knowing what to do with her frustrations and anger, possibly taking them out on Joshua. None of this can be proven, and at this point of time, none of them are serious enough to warrant court intervention. Chris Howe and I will continue to meet with the family even though they have become more and more resistive for purposes of monitoring Joshua in his best interests. Although the family has one again entered into a social service agreement, allowing me to meet with them, I have found that recently they have not been home for scheduled appointments, but that it is easy for me to simply stop in unannounced. We will make continued attempts to improve the parenting skills within this family

unit and to lower their expectations of Joshua's behavior and general motor development skills.

NEW SERVICE PLAN—Established 1/25/84

CONTRACT:

Same service plan continued.

FINANCIAL INFORMATION:

The services this client are to receive are fee exempt.

Dictated 1/30/84 A. KEMMETER/fl Transcribed 2/21/84

Social Service Plan Review Date: 7/25/84

INTERVENING NARRATIVE:

On Thursday, March 8, 1984, at approximately 7:00 p.m., I received a phone call from Helpline requesting I contact Judy, an RN at the Emergency Room at Mercy Medical Center. I asked whether an Oshkosh Child Protective Service worker might be available and I was informed I had been specifically requested. I phoned Mercy and spoke with Judy. Judy informed me Joshua DeShaney had been brought into the Emergency Room with a head injury. I have been providing social services to this family for a little over a year and have been continually concerned for the welfare of Joshua. I informed Judy I would be there within a half hour (I live in Neenah so had to drive to Oshkosh.))

When I arrived, I initially met with Siser Joanne Hein, chaplain at the hospital, an RN, Marie DeShaney, a half aunt of Joshua's and also Randy's present girlfriend, as well as Rusty, Marie's two year old son. I was informed Randy was in another waiting area as Joshua was undergoing a CAT scan.

I asked Marie what had happened and she informed me Joshua had fallen down the basement stairs, about four of them. I reiterated my concern to her that Joshua has simply had too many accidents and was she sure this is what had happened. She said yes.

I then spoke with Sister Hein and the RN that was with her, and they informed me that Joshua had suffered a severe head injury and that was why a CAT scan had been ordered. The child was brought into the hospital unconscious by Randy and Marie. They also informed me that Randy had displayed violent behavior when Joshua had been brought in by pounding on the doors and walls. They expressed concern as to whether he would strike out at an employee.

Randy was coming down the hall, obviously upset. I spoke with him in an attempt to calm him down. Randy was crying, shaking and speaking very loudly. He told me Joshua is his whole life and that if anything happened to Josh he would have no reason to live and mentioned the possibility of suicide. I was able to get Randy back to the small lounge area. While he was sitting there, he was shaking uncontrollably, sobbing and still very upset. I then spoke with the nursing staff to see if the Emergency Room physician could give Randy some sort of sedation. At approximately 9:30 p.m., Dr. Plueddeman ordered Randy be given 5 mg of Haldol by injection.

In the meantime, I contacted the Oshkosh Police Department requesting assistance with this case as I suspected child abuse. Det. Novotny and Officer Kronenwetter came over to the hospital. I informed them of my past

involvement with this family, including a summary of our initial involvement when Josh had been admitted to the Emergency Room at Theda Clark Regional Medical Center in January of 1983 with suspicions of child abuse.

Det. Novotny met with Randy alone and Marie in an attempt to determine what had happened to Joshua.

I briefly saw Joshua upon the completion of his CAT scan. A nurse was using a hand respirator to help the child breathe. I noted bruising on the child's cheeks, primarily the left one. I also noted a line type bruise across the base of the child's neck (throat). It was difficult to note all of the bruises at that time as the child had many tubes and tapes on his face. His eye lids were taped shut. I did not see him for a long period as I was informed they were preparing him for brain surgery.

The nursing staff informed me that Joshua had bleeding in the skull and surgery would be necessary to relieve the pressure on the brain.

Randy and Marie were sitting with Joshua when the police department arrived. Randy was stroking Joshua's hair, crying but basically composed. Randy had been sedated by this time. I asked Randy to come with me to meet with the officers from the police department. He cooperated but expressed concern as to why it was necessary as Joshua's injuries were an accident and again told me he had fallen down the stairs and again said to me "Ann, you know Joshua bruises easily."

Due to the seriousness of the case, I phoned my supervisor, Cheryl Stelse, to appraise her of the situation. After conferring with Det. Novotny regarding the case, I phoned

Ms. Stelse back asking if she could bring Joshua's Social Service record down to the hospital for Det. Novotny to review. We were advised that Joshua had a 25% chance of pulling through the surgery that evening.

We were also informed that Joshua did have blood in his urine and that an x-ray had been taken of the abdomen to determine if there was any extensive internal bleeding. The main concern of the medical personnel that night was to attempt to correct life threatening conditions for the child. It is unknown if there were/are any other injuries, i.e. broken bones.

Det. Novotny phoned District Attorney Dee Dyer in reference to the case as the child's life was in jeopardy. I also spoke with Dee Dyer with some basic background information being shared. Ms. Stelse arrived during the time we were talking with the District Attorney.

Det. Novotny and I did not contact a Juvenile Court Intake Worker until the surgery had been completed not knowing whether Joshua would survive.

Prior to the completion of the surgery, Randy and Marie requested to leave the hospital to get some fresh air and to get some cigarettes. They also wanted to check to see if a neighbor/friend, Tammy Winkler, was home yet so that she could take care of Marie's son, Rusty.

Randy, Marie and Rusty left the hospital. Tammy Winkler was not home so Rusty returned to the hospital with them. Randy and Rusty returned to the small lounge area and fell asleep while Marie went to another area and watched television. Randy had also wanted to go home prior to the completion of the operation but I convinced him to stay as they have no telephone, and surely they

would want to know the result of the surgery and speak with the doctor. Randy agreed.

It should also be noted during the entire time I was at the hospital that night that Marie remained controlled. While she was shaking from time to time and appeared tense, at no time did I see her cry or express sadness/remorse over the situation.

After the surgery, Dr. Letellier, a neurosurgeon, informed all of us including Randy and Marie, that it was necessary for him to remove a large part of the child's skull to relieve the pressure. He informed the family that the child was in Intensive Care and would remain there indefinitely. He also told the family it could be weeks before Josh would wake up if he did at all. Randy, Marie and Rusty left the hospital at that time to return home.

Dr. Letellier, his nurse, medical staff from Emergency Room met with Det. Novotny, myself, Cheryl Stelse and Officer Kronewetter. He informed us that there were several points of internal bleeding in Joshua's skull. He was able to stop the bleeding and remove the already present blood. He also noted that Joshua did not have a skull fracture which therefore did not make the injury consistent with what the family indicated had happened. He noted there were several spots of old bruising of Joshua's head noted only after the head had been shaved for the surgery. He stated the only way he could have suffered the type of bleeding he had would have been by a violent shaking or continuous hard hitting of the head as by an open hand. He noted there was no other point of impact on the head nor was there any external bleeding on the head. Dr. Letellier removed a large part of the skull to

relieve the pressure. The next major concern would be the amount of swelling the brain would incur due to the trauma. His prognosis for Joshua was very guarded. He felt Joshua would make it through the night.

At approximately 12:40 a.m., Gladys Farr, Juvenile Court Intake Worker, was contacted to authorize Temporary Physical Custody. This was granted.

On Friday, March 9, I met with John Juknialis, Juvenile Court Intake Worker, to advise him of the situation. I informed him that Det. Novotny would be meeting with Randy and Marie again as part of the ongoing investigation. I advised John that the father had left the hospital prior to the Department taking temporary physical custody of the child and therefore the Waiver had not been signed. John Bodnar, Assistant Corporation Counsel, was also advised of the situation. John Juknialis met with Randy and myself after being interviewed by Det. Novotny. Randy signed the waiver. It was made clear to Randy that he could not remove the child from the hospital until further order of the Court.

In meeting with John Juknialis and John Bodnar, it was determined it would be in everyone's best interests that if Randy were to see Joshua, he should be allowed to go to the hospital and view the child from the child's window in intensive care.

At approximately one o'clock that afternoon I went to Mercy Medical Center and met with Ann Marshall, hospital social worker. I brought along signed temporary physical custody orders as well as the signed waiver to be put on Joshua's chart. We met with the nurse that was caring for Joshua and the supervisor of the unit. I explained to them that there may be two courts involved with this case, both Juvenile and Criminal. I explained that Joshua could not be removed from the hospital without further order of the Court. I also asked them if they felt comfortable with our suggested visitation request. They felt it would be appropriate.

At that time, I also learned that the pressure in Joshua's brain seemed to be under control. They told me there was some involuntary movement which may be a good sign. His blood levels were okay. I also requested to see the other bruising to Joshua's body. There was extensive bruising to both his right and left lateral thighs. Bruising in the groin area. Two bruises to his left upper arm. The child's head was completely bandaged making it impossible to check any facial or head markings. The child is on life support systems (a machine is breathing for him.) Joshua was also receiving intravenous feeding, had drain tubes, etc., from the right side of his head where the surgery had been performed. He has a nurse with him constantly.

From the hospital I went to the home of Randy. Randy had been on the sofa trying to sleep when I arrived. Rusty was in his bedroom taking a nap and Marie was over to the home of Tammy Winkler across the street. I informed Randy that I had just come from the hospital and updated him on Josh's condition. I also advised him as to how visitation would be handled. I explained that due to the intensive care Joshua was in need of plus the amount of machinery that was necessary for the care of Joshua it would be best if he not enter the room so the nurse would have no interference. Randy agreed.

I asked Randy again what had happened the previous night explaining that I was not law enforcement. Randy told me that he and Marie were repairing a clock and realized they needed a screw driver. Randy also told me the coffee table had some nails that were coming out of their coffee table and a hammer was also needed. Joshua volunteered to go down to the basement to get the hammer and screw driver. Randy stated he walked out to the kitchen with Marie following him to open the door from the kitchen to the back hall. The door does not have a door knob and the night lock chain on the upper part of the door is used to pull it open. (Marie came home at this point. Randy went back to the sofa and Marie continued with the story.) Marie told me the door was open and Joshua went down the steps. He was wearing his pajamas with feet and that the feet were too big for Joshua. She said she and Randy were in the kitchen when they heard a bump, bump, bump. They called to him and when there was no answer Randy ran downstairs.

There are six relatively steep steps going down to the basement. They are partially covered by a green linoleum, part of which has been chipped off. At my request, Randy joined us at that point and told me that Joshua was found curled in a ball laying a bit to the right with his head facing the front of the house. The workbench where the tools are would necessitate a right turn from the steps. Randy said Joshua was limp and did not think he was breathing, so he took him upstairs and he and Marie tried mouth to mouth as well as CPR. Randy told me he slapped Joshua's cheeks and yelled at him to wake up. When they got no response they took him to Mercy. At no time did either one of them mention that they heard any screams from Joshua, just the bump, bump, bump.

Perhaps it should also be noted that the evening of March 8, I did not observe any bruising or markings on Rusty, Marie's son, nor have I ever been concerned that that child was being abused during the year plus that I have been involved with the family. I have had continued concerns of abuse to Joshua and in November, Chris Howe of the Child Protective Service Unit joined me to team this case. I also attempted to have Joshua enroll in the Headstart Program in order that he may have more visibility in the community. Ruth Davis of Headstart had contact with the family and the family refused to have Joshua attend.

The following is a list of dates which note some type of injury to Joshua.

January 22, 1983—Theda Clark Regional Medical Center. Laceration to the head and multiple bruising. Suspected child abuse. Teamed by the Child Protective Service Team at the hospital. Documents in our record. Note: Randy was fishing in New London when this incident occurred and did not arrive at the hospital until much later.

March 14, 1983—Theda Clark Regional Medical Center. Josh seen in emergency with laceration to forehead.

May 2, 1983—On my home visit, I noted a bump on Joshua's forehead.

September 14, 1983—Oshkosh Police Department phoned reporting that a small child (Joshua) was being slapped by a woman (Marie) repeatedly with the child falling to the ground.

September 21, 1983—Mercy Medical Center. Joshua seen in Emergency Room for a laceration on the forehead.

October 19, 1983—On my home visit, I observed a lump on Joshua's left forehead.

November 9, 1983—On my home visit, I noted markings on Joshua's chin. I wondered if they might have been cigarette burns.

November 11, 1983—Oshkosh Police Department was contacted twice with domestic problems and violence between Marie and Randy.

November 12, 1983—Oshkosh Police Department was contacted as Randy had allegedly beaten Marie.

November 30, 1983—Mercy Medical Center. Joshua was taken to the emergency room with a laceration on the right forehead/bruises on both shoulders and blood in the left nostril. The left ear was red and swollen.

January 9, 1984—Ruth Davis from Headstart had made a home visit to enroll Joshua in Headstart. She found Joshua home alone.

January 18, 1984—On my home visit, I did not see Joshua as he was allegedly in bed with the flu.

February, 1984—I attempted contact but found no one home.

March 3, 1984—Marie was apparently seen at Mercy Medical Center with a split lip, requiring sutures. She and Randy were allegedly having a fight.

March 7, 1984—Unannounced home visit by me. It was Rusty's second birthday and Marie and Randy were in the kitchen decorating his birthday cake. I wrote Happy Birthday Rusty on the cake and Randy finished decorating. Both Marie and Randy seemed to be at ease and told

me there were fewer fights and they were getting along much better. Marie had had nose surgery for some type of blockage and reported that her nose was tender. At no time did she mention that Randy had apparently hit her splitting her lip requiring medical attention.

Rusty and Joshua were taking a nap. Joshua had woken up. Marie went back to his bedroom quieting him down and then came back to the kitchen where we all were. I don't know why but I did not ask to see Joshua. All appeared to be okay and a relaxed atmosphere in the household.

They did mention that Joshua had fainted several days earlier in the bathroom for no apparent reason.

They also told me that Randy might have a job with a security company and that he was being called back for a third interview. Just prior to my leaving Randy started to clean approximately 25 perch he had caught. They were having friends over for dinner that night to celebrate Rusty's birthday. Randy was filleting the fish in order that the children could eat them without the fear of the children having bones caught in their throat. I was at the home for about forty-five minutes.

On Saturday, 3/10/84, I spoke with hospital personnel on two occasions, Joshua continues in critical condition. They are having increased difficulty in controlling the pressure in his brain. Prognosis is not good.

On Sunday, 3/11/84, I stopped by Mercy Medical Center. I spoke with the staff and also saw Joshua and his family. The nurse reported Joshua is continuing to have increased difficulty with pressure on the brain. I arrived at ap-

proximately 2:45 p.m. A brain pressure of zero is normal . . . 30 is a danger zone. While I was there the machine registered a fluctuating reading of 28—29 and 30. The nurse reported it was too soon to give Joshua any further medication. The prognosis remains extremely poor. Randy, Marie and her son Rusty were in the ICU visiting area. I went in to speak with them. While I was there there was a phone call for Randy. He reported it was a call from his former wife, Melody, in Wyoming . All I could hear from the conversation was that Joshua was in the hospital and that Joshua had fallen down some stairs. Randy gave me her phone number (307) 637-4342. To my knowledge, he still has not been able to contact his father who is a truck driver, but was also to contact Kim, perhaps a half/step brother.

Dictated 3/11/84 A. KEMMETER & Transcribed 3/15/84/la

Client Name: Joshua E. De Shaney; FS-17576 CW

INTERVENING NARRATIVE

CONTACT DATES:

3/12—Mercy Medical Center; Theda Clark Regional Medical Center; conference with Detective Novotny; District Attorney's Office; John Juknialis, and Attorney John Bodnar; 3/13—Mercy Medical Center; 3/4—meetings with Melody DeShaney, her mother, Myrna Bridgewater, Tom and Kim DeShaney, Randy and Marie; Ann Marshall; Detective Novotny; John Juknialis, Intensive Care Unit staff; 3/15—team meeting—Mercy Medical Center; 3/16—phone contact—Kim and Tom DeShaney; phone contact—Mercy Medical Center, regarding Joshua's condition; 3/19

—phone contact—Mercy Medical Center; phone contact—Ada Weimer; Betty Tellock, and Detective Novotny; 3/20—phone contact—Ann Marshall; John Juknialis, and Attorney Bodnar; 3/21—Novotny, Bodnar, Marshall, Juvenile Court Intake; 3/23—phone contact—John Juknialis; 3/27—Mercy Medical Center—team meeting; 3/28—Randy and Marie, Intensive Care Nursing staff and Joshua; 3/30—phone contact—Melody DeShaney; 4/4—Mercy Medical Center; Randy and Josh; 4/5—phone contact—Dee Dyer; Ann Marshall; 4/6—phone contact—Ann Marshall; Dee Deyer; John Juknialis; 4/10—phone contact—Ada Weimer; 4/11—Ann Marshall; John Juknialis; 4/12—phone contact—John Bodnar; Juknialis; 4/16—Joanne Juettner, Mental Health Clinic; 4/18—Randy; Ann Marshall; 4/19—Ann Marshall; John Juknialis; Detective Novotny; Ada Weimer; 4/14—Ada Weimer's home in Milwaukee; 4/25—meeting with Bodnar, Dan Venne, Detective Novotny; 4/26—Rusty was taken into temporary physical custody and placed in foster care after a meeting with Dan Venne, Detective Novotny, Marie, and Randy; 4/27—waiver hearing in front of Leo Mack, Court Commissioner; 4:30—conference with guardian ad litem, Pat Seubert; 5/1—conference with guardian ad litem, Seubert, Pam Thorp; 5/2—Institutional Review meeting at Mercy Medical Center; 5/3—conference with Dee Dyer and Gene Bartman; 5/7—initial hearing for Joshua; 5/16—Melody DeShaney; Marie; Rusty; Randy; Mrs. Weimer; Debbie Tellock; 5/17—John Doe hearing; 5/18—phone contact—Ann Marshall; 5/30—conference with Gene Bartman; 5/6—Joshua was transferred to Central Wisconsin Center, Madison; 6/11—conference with Attorney Seubert; 6/15—status conference with Judge Williams; John Bodnar, and Attorney Tom Fink; 6/27—Central Wisconsin Center, Madison; Joshua and staff.

Joshua remained in critically stable condition and in the Intensive Care Unit at Mercy Medical Center from his admission until March 30, at which time he was transferred to the Pediatric Unit. He remained on the Pediatric Unit until June 5, 1984, at which time he was transferred to Central Wisconsin Center for the Developmentally Disabled in Madison. At the March 27th team meeting at Mercy Medical Center, both Dr. Letellier, the brain surgeon, and Dr. Kayali, Pediatrician, felt that Joshua would live, but indicated severe brain damage. It was also noted that if Joshua were to expire it would be the result of either massive infection or upper respiratory failure. Copies of Joshua's medical records are attached in the record for specific details during his recuperation at the hospital. In early May, the Institutional Review Committee met, including Mary Ann Grundy from the 51.42 Board, and it was determined at that time that Central Center was probably an appropriate placement for Joshua.

The staff from Central Center came to Mercy Medical Center for evaluation purposes and also deemed him an appropriate placement at their institution. Prior to his leaving Mercy Medical Center, however, Dr. Letellier felt it was in Joshua's best interest to put a plate in the head where the skull bone had been removed at the time of inital surgery. It appeared to the staff at Mercy Medical Center and has been confirmed by the staff at Wisconsin Central Center that once the plate had been replaced, Joshua has made tremendous strides in cognitive abilities. The staff at Central Center feel that Joshua will regain m mory, will regain speech, and will need intensive amounts of physical therapy to regain use of his limbs. Joshua has virtually no control over any of his limbs nor

does he have head control. It was determined from one of the EEG's performed at Mercy Medical Center that Joshua was brain dead on the right side. The staff at Central Center, however, feel that the brain is growing —which will be to his advantage providing he receives the correct stimulation and therapy for Joshua's intellectual development.

It is presently the strong and urgent recommendation of the staff at Central Wisconsin Center, with whom we met on 6/27/84, that Joshua be transferred immediately to a rehabilitati:a center, with their recommendation that he be placed at Gilette Rehab Center in St. Paul, Minnesota. Joshua is no longer appropriate for placement at Central Center in view of his intellectual development. They feel very strongly that Joshua needs to be placed in a setting where there are normal children for ongoing stimulation. The Rehab Unit in St. Paul has a child unit, which to their knowledge is the only rehab center with such facilities. There is also concern by the staff that if he is not placed shortly, he may regress—resulting in more damage. Also, if he is not provided with appropriate stimulation, apparently, the "brain cells could make wrong connections" which would be more harmful to Joshua in the long run if he does not receive the appropriate and correct stimulation. I will be checking with Gillette Rehabilitation Center within the next day or two to determine possible placement.

RANDY:

Criminal charges are presently pending against Randy. He has been charged with two counts of child abuse and

one count of conduct regardless of life through the District Attorney's Office. Randy was arrested on May 30, 1984 and has been detained in the Winnebago County Jail since then. Randy appeared before Judge Carver for a bail hearing, and to my understanding, became very upset and violent in the court room, and therefore, the bond was set at $3,000. Randy is unable to come up with the money and, therefore, remains in jail. He was arrested after an extensive investigation and John Doe hearing held before the Honorable Robert Haase. He is presently being represented by Attorney Thomas Fink, of Menasha, and will enter a plea to the charges on June 29, 1984.

During the course of Joshua's hospitalization at Mercy Medical Center, Randy spent the majority of his time, both day and night, at the hospital with Joshua. He did not interfere with Joshua's care—he was a very attentive father and very cooperative. Randy did become very upset and angry of what he felt were accusations of child abuse against him, and at the point an article appeared in the paper—Randy became very agitated—seeking out officials to stop any further information being released. It is uncertain as to how the press became aware of the situation in Joshua's condition.

MARIE AND RUSTY:

On April 26, 1984, Rusty DeShaney, son of Marie, was taken into temporary physical custody and placed in foster care. The decision was made to take Rusty into temporary physical custody after reviewing the results of the extensive investigation by the Police Department and our Department. What we were not aware of at the time was the amount of violence that had occurred within the household,

specifically between Randy and Marie themselves. Taking into consideration Joshua's critical injuries, as well as the violence between the two adults in the home, Dan Venne, Juvenile Court Intake Worker, Detective Novotny, and I felt that there was no option but to protect Rusty by placement in foster care. Marie and Randy refused to sign the waiver, and, therefore, a hearing was held on the following day in front of the Honorable Leo Mack.

Rusty had been residing with the Weimer family in Milwaukee since March 11, 1984. Rusty was removed from the Weimers and placed in a foster home in Winnebago County. Rusty's Juvenile Court process has been completed; the Honorable Robert Hawley making a finding that Rusty was a child in need of protection and services under Wisconsin Statutes 48.13 (3), physical abuse, and 48.13 (11) emotional damage. Virginia Sherer, of the Foster Care Unit, is presently involved with Rusty and Marie.

PRESENT STATUS:

As indicated previously, Randy has been charged with two counts of child abuse, and one count of conduct regardless of life. I will make the assumption that this will go into a jury trial within the next 30 to 60 days In the meantime, all Juvenile Court proceedings will remain on hold until the completion of Criminal Court action in order that one does not interfere with the other or jeopardize each other's case in any way. Assistant Corporation Counsel, John Bodnar, and guardian ad litem, Patrick Seubert, are in agreement with Judge Williams for the decision to hold off with the Juvenile matter. At the present time, Winne-

bago County Department of Social Services holds legal custody of Joshua, and at present there is a Court Order for him to be placed at Central Wisconsin Center in Madison. Plans are in the process of being formulated for Joshua to enter a rehabilitation center, possibly the Gillette facility in St. Paul, Minnesota. There is no urgency to hear this matter in Juvenile Court in view of the fact that Joshua is receiving the special care and attention he is in need of.

It should also be noted that Melody DeShaney, Joshua's birth mother, is very interested in obtaining legal custody for placement with her upon completion of Joshua's rehabilitation. She has contacted Attorney George Curtis to represent her in these proceedings. Attorney Seubert will be contacting the Department of Social Services in Cheyenne, Wyoming, requesting a home study of Melody to determine the feasibility of having Joshua placed with her.

For further information and details regarding this family and Joshua, please refer to the attachments in the records for police reports, medical reports, Court information, etc.

End of intervening narative.

Dictated 6/28/84 A. KEMMETER/fl Transcribed 7/13/84

ATTACHMENT "H"

PETITION FOR DETERMINATION OF STATUS—IN NEED OF PROTECTION OR SERVICES

1. Children's Division; 2. County: WINNEBAGO; 3. Intake Case No. J1 202; 4. In the interest of: JOSHUA E. DeSHANEY, a person under the age of 18; 5. Child's Street Address: 34 W. Tennessee Ave., City: Oshkosh, State: WI, Zip: 54501; 6. Birthday: 3-21-79 (5); 7. Father's name and Address: Randy DeShaney, 34 W. Tennessee Ave., Oshkosh, WI 54901; 8. Mother's Name and Address: Melody DeShaney, Cheyenne, Wyoming, (Phone # 307-637-4242); 9. Guardian, Legal Custodian, Spouse or Nearest Relative's Name and Address: Randy DeShaney; 10. Child in Temporary Physical Custody: [ ] No [ ] Yes; 11. Where Held (Staying): Mercy Medical Center, 631 Hazel St., Oshkosh, WI 54901; NOTE: If facts 4. thru 14. are unknown or cannot be ascertained, so state; 12. Date of Custody: 3-9-84; 13. Time of Custody: 12:40 A.M.; 14. Disclosure of Location is Dangerous to Child or Custodian: [X] No [ ] Yes;

15. TO THE CIRCUIT COURT, CHILDREN'S DIVISION:

Ann L. Kemmeter your Petitioner, hereby, states on information and belief, towit: That the Child named above is In Need of Protection or Services, in that, he has been the victim of physical abuse including injury which is inflicted by another by other than accidental means, pursuant to sec. 48.13(3), Stats., and that the child's parent, guardian

or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary care, and medical care so as to seriously endanger the physical health of the child, pursuant to sec. 48.13(10), Stats., to wit:

1. On March 8, 1984, Joshua DeShaney was brought to the Emergency Room of Mercy Medical Center, Oshkosh, by his father, Randy DeShaney, and Randy DeShaney's girlfriend, Marie DeShaney. (Marie DeShaney is divorced from Randy DeShaney's half-brother.) Joshua DeShaney was comatose at the time that he entered the Emergency Room at Mercy Medical Center. In addition, Joshua was having difficulty breathing and resuscitation was necessitated with a hand respirator. The Emergency Room staff was informed by Mr. DeShaney and Ms. DeShaney that Joshua had fallen down the basement steps in the DeShaney home and had suffered a severe head injury. A CAT scan was immediately run by the hospital staff on Joshua DeShaney. A determination was made, pursuant to the result of the CAT scan, that Joshua was suffering from cerebral bleeding, thus necessitating neurosurgery to relieve the pressure placed on the brain by such bleeding.

16. Wherefore, Petitioner prays that the Court fix a time, date and place for hearing on the Petition according to law and find that the named Child in Need of Protection or Services, and that the Court enter an order determining the status of the named Child to provide for future care, custody, status, and/or such other

disposition and provision as the Court shall deem necessary and proper in the best interests of the named Child and the public in accordance with Chapter 48, Wisconsin Statutes.

Signed: /s/ Ann L. Kemmeter, Petitoner

17. Prosecutor's Name and Title: John A. Bodnar, Asst. Corp. Counsel; 18. Signed and Approved for Filing: John A. Bodnar; 19. Date: 4/25/84.

2. That an examination of Joshua DeShaney's body completed by Dr. B.F. Kayali, a pediatrician, shortly after Joshua's admission to Mercy Medical Center noted extensive bruising to Joshua's right and left lateral thighs. Dr. Kayali also noted bruising of the child's groin area. Two bruises were also noted on Joshua DeShaney's left upper arm. Dr. Kayali has informed petitioner's attorney that upon questioning Randy DeShaney as to the cause of the bruises on Joshua's thighs, Randy DeShaney informed Dr. Kayali that these bruises were a result of spanking or corporal discipline inflicted upon Joshua by Randy DeShaney.

3. Dr. Marc Letellier performed neurosurgery upon Joshua DeShaney on March 8, 1984. Dr. Letellier removed a large part of Joshua's skull to relieve the pressure on Joshua's brain. Dr. Letellier informed the petitioner that there were several points of internal bleeding inside Joshua's skull. The neurosurgery performed on Joshua allowed Dr. Letellier to stop the bleeding within Joshua's skull and remove

the already present blood. Dr. Letellier further noted to the petitioner that Joshua had not suffered a skull fracture and that there was no apparent new bruising on Joshua's head. Dr. Letellier informed the petitioner that it was his professional opinion that Joshua's injuries were inconsistent with Mr. DeShaney's explanation as to how such inuries occurred. Dr. Letellier based this opinion upon the observation that no point of impact was noted on the head nor was any external bleeding to the head present. It was Dr. Letellier's professional opinion that Joshua's brain injuries could only have been suffered as a result of violent shaking or continuous hard hitting of the head, as by an open hand. Such shaking, according to Dr. Letellier, resulted in the tearing of blood vessels within the skull, thus leading to the cerebral hemorrhaging which was discovered upon neurosurgery. Dr. Letellier further informed the petitioner that several spots of old bruising to Joshua's head were noted after his head had been shaved for surgery.

4. Dr. Kenneth Viste, a neurologist, has diagnosed Joshua DeShaney as presently suffering from profound traumatic encephalopathy with probable associated seizure disorder. Joshua is completely paralyzed on the left side of his body and Dr. Viste has diagnosed

Signed: Ann L. Kemmeter, Petitioner

Signed: John A. Bodnar, 4/25/84
Petitioner

John A. Bodnar, Assist. Corp. Counsel

Joshua as having virtually no electrical activity in the right hemisphere of his brain. Joshua DeShaney

is presently semi-comatose. He does not respond to verbal stimulation at this time. Some response to tactile stipulation of Joshua has been noted by the medical personnel treating him.

5. Joshua DeShaney's medical records indicate a history, within the last fourteen months of extremely frequent bruising and injury. The petitioner is presently of the belief that such past bruising may be attributable to child abuse. Such bruising includes an admission of Joshua DeShaney to Theda Clark Regional Medical Center, Neenah, on January 22, 1983, for lacerations to the head and multiple bruising on Joshua's body. On March 14, 1983, Joshua DeShaney was again admitted to the Emergency Room of Theda Clark Regional Medical Center with a laceration to his forehead. On September 21, 1983, Joshua DeShaney was seen at the Emergency Room at Mercy Medical Center with a laceration to his forehead. On September 21, 1983, Joshua DeShaney was seen at the Emergency Room at Mercy Medical Center with a laceration to his forehead. In addition, your petitioner, on May 2, 1983, noted a bump on Joshua's forehead during a home visit. On October 19, 1983, the petitioner observed a goose bump on Joshua's left forehead during another home visit. On November 9, 1983, the petitioner noted markings on Joshua's chin during a home visit which resembled cigarette burns. On November 30, 1983, Joshua DeShaney was brought to the Emergency Room of Mercy Medical Center suffering from a laceration on the right forehead, bruises on both shoulders, and blood in the left nostril of his nose. His left ear was also red and swollen at the time.

6. Your petitioner is aware of a history of previous domestic violence in the DeShaney home. On November 11, 1983, the Oshkosh Police Department was contacted twice with regard to domestic problems and violence between Marie DeShaney and Randy DeShaney. On November 12, 1983, the Oshkosh Police Department was again requested to investigate an alleged beating of Marie DeShaney by Randy DeShaney. On March 3, 1984, Marie DeShaney was provided treatment at Mercy Medical Center for a split lip, which required sutures. This injury was apparently the result of a fight between Randy DeShaney and Marie DeShaney.

7. On April 16, 1984, Tammy Winkler, 29 W. Tennessee Ave., Oshkosh, WI, informed the Oshkosh Police Department that in February of 1984, Joshua DeShaney had informed her that he was having problems urinating and that his penis hurt. Joshua DeShaney informed Ms. Winkler, at that time, that his penis hurt in that Marie DeShaney had kicked him in the penis prior to that time.

Signed: Ann L. Kemmeter, Petitioner

Signed: John A. Bodnar, 4/25-84
Petitioner

John A. Bodnar, Assist. Corp. Counsel

8. On April 16, 1984, Kelly J. Dudebobre, Augusta, WI, informed the Oshkosh Police Department by affidavit that on December 8 or 9, 1983, Marie DeShaney had stated that she could not stand Joshua DeShaney and hated him and that she was afraid that she would hurt

him or maybe even kill him in the future. Later, that same night, Kelly Dudevobre observed Joshua DeShaney in the company of his father. Joshua had stitches in his head at that time. When Kelly Dudebobre inquired of Randy DeShaney as to how such stitches had come to be necessitated, Randy DeShaney replied Joshua DeShaney had defecated in his pants; Marie DeShaney had told him to clean up his pants and when Joshua DeShaney refused to, Marie DeShaney struck Joshua DeShaney causing his head to hit the bathroom sink, thus causing a cut for which stitches were necessitated.

9. Ada E. Weimer, 3079 N. 37th St., Milwaukee, WI, has stated to the Oshkosh Police Department, that in the summer of 1983 she observed Randy DeShaney bodily throwing Joshua DeShaney through the air.

10. Debra L. Tellock, 356 Oak St., Menasha, WI, has informed the Oshkosh Police Department that during the summer of 1982, she observed Randy DeShaney throw Joshua through the air on several occasions and also kick Joshua DeShaney in the back.

11. It is the petitioner's belief, upon information provided to her by Drs. Letellier, Kayali, and Viste, and upon information provided to the Oshkosh Police Department by the aforementioned persons, that Joshua DeShaney has been abused over a long period of time by both Randy DeShaney and Marie DeShaney. Moreover, petitioner has not been provided any information which would show that Joshua DeShaney was under the care or control of any person other than Marie DeShaney and Randy DeShaney immediately

prior to the injury which led to his hospitalization on March 8, 1984.

Signed: Anne L. Kemmeter, Petitioner

Signed: John A. Bodnar, 4/25/84 Petitioner

John A. Bodnar, Asst. Corporation Counsel

Office

TEMPORARY PHYSICAL CUSTODY REQUEST

(Requesting Agency Complete items 3-18)

2. County—

Child's Last Name—DeShaney First Name—Joshua. Middle—E. 4. Birthdate—3-21-79. 5. Sex—☐ Male ☐ Female. 6. Date taken in custody—1/22/83 Time 4:15 P.M. Address—110 Wright City—Neenah State—Wisconsin Zip—54956 County—Winnebago 8. Telephone —None—Father's Name & Address—DeShaney, Randy A. 110 Wright Neenah, Wisconsin Telephone—Home none Mother's Name & Address—DeShaney, Melody E.—whereabouts unknown Guardian/Legal Custodian's Name & Address—DeShaney, Randy A. 110 Wright Neenah, Wisconsin Requesting Agency Name—Neenah Police Dept. 13. Request Date:—1-22-83 Time:—4:15 PM 14 Agency Case No.— Agency Address—Doty Street, Neenah 16. Agency Representative—Keith Nelson Telephone—(414) 729-4677 Reasons for Taking Child Into Physical Custody—(Check All That Apply)—☐ Warrant Capias Judicial Order Dated:———. ☐ Issued by Judge ——— County——— Court———

☐Reasonable Belief

☐ Capias or Warrant or Fugitive ☐Run Away From Home [X] Suffering from Illness or Injury or in Immediate Danger ☐ Violated Court-Ordered Supervision ☐ Capias or Warrant From Other State (Specify)———

☐ Committing or Has Committed Crime (Specify)———

☐Violated a Civil Law or Local Ordinance Punishable by Forfeiture (Specify)———

☐ Violated "Continuation of Custody" Order Dated——— Reason Child Not Immediately Released—Physician ordered the child admitted to the hospital for investigation of possible child abuse. Intake Worker Authorization (Intake Worker Complete Items 1 & 2 and 19-27. Distribute copies.) Criteria for Holding a Child in Physical Custody (s. 48.205) —(Check All That Apply) A. If the named child is not held he/she will—(1) ☐ commit injury to the person or property of others (2) ☐ cause injury to self (3) [X] be subject to injury by others. B. ☐ The parent, guardian or legal custodian of the named child is—☐ unavailable ☐ unwilling ☐ unable to provide adequate supervision and care. C. ☐ The child will run away or be taken away so as to be unavailable for proceedings of the Court, Children's Division. ☐ Criteria of s. 48.205 Not Met. Named Child Released To: ☐ Self ☐ Parent/Guardian. Parents Notified? ☐ Yes [X] No Date— Time— A.M./P.M. Worker— 22. Child's Rights Given? ☐ Yes [X] No Worker— Being Duly Authorized by the Circuit Court, Children's Division, I Hereby Order The Following: A. ☐ Immediate Release To: ☐ Self ☐ Parents ☐ Guardian ☐ Legal Custodian ☐Home of Relative ☐ Responsible Adult B. ☐Placement in NON-secure custody at (Specify): Theda Clark Hospital ☐ Home Detention Requested ☐ Rules Issued. • • •

Office

TEMPORARY PHYSICAL CUSTODY REQUEST

(Requesting Agency Complete items 3-18)

2. County—

Child's Last Name—DeShaney First Name—Joshua. Middle—E. 4. Birthdate—3-21-79. 5. Sex—☐ Male ☐ Female. 6. Date taken in custody—1/22/83 Time 4:15 P.M. Address—110 Wright City—Neenah State—Wisconsin Zip—54956 County—Winnebago 8. Telephone —None Father's Name & Address—DeShaney, Randy A.

110 Wright Neenah, Wisconsin Telephone—Home none Mother's Name & Address—DeShaney, Melody E.—whereabouts unknown Guardian/Legal Custodian's Name & Address—DeShaney, Randy A. 110 Wright Neenah, Wisconsin Requesting Agency Name—Neenah Police Dept. 13. Request Date:—1-22-83 Time:—4:15 PM 14 Agency Case No.— Agency Address—Doty Street, Neenah 16. Agency Representative—Keith Nelson Telephone—(414) 729-4677 Reasons for Taking Child into Physical Custody—(Check All That Apply)—☐ Warrant Capias Judicial Order Dated:————. ☐ Issued by Judge ———— County———— Court————

☐Reasonable Belief

☐ Capias or Warrant or Fugitive ☐Run Away From Home [X] Suffering from Illness or Injury or in Immediate Danger ☐ Violated Court-Ordered Supervision ☐ Capias or Warrant From Other State (Specify)————
☐ Committing or Has Committed Crime (Specify)————
☐ Violated a Civil Law or Local Ordinance Punishable by Forfeiture (Specify)————

☐ Violated "Continuation of Custody" Order Dated———— Reason Child Not Immediately Released—Physician ordered the child admitted to the hospital for investigation of possible child abuse. Intake Worker Authorization (Intake Worker Complete Items 1 & 2 and 19-27. Distribute copies.) Criteria for Holding a Child in Physical Custody (s. 48.205) —(Check All That Apply) A. If the named child is not held he/she will—(1) ☐ commit injury to the person or property of others (2) ☐ cause injury to self (3) [X] be subject to injury by others. B. ☐ the parent, guardian or legal custodian of the named child is—☐ unavailable ☐ unwilling ☐ unable to provide adequate supervision and care. C. ☐ The child will run away or be taken away so as to be unavailable for proceedings of the Court, Children's Division. ☐ Criteria of s. 48.205 Not Met. Named Child Released To: ☐ Self ☐ Parent/Guardian. Parents Notified? ☐ Yes [X] No Date— Time— A.M./P.M. Worker— 22. Child's Rights Given? ☐ Yes [X] No Worker— Being Duly Authorized by the Circuit Court, Children's Division, I Hereby Order The Following:

A. ☐ Immediate Release To: ☐ Self ☐ Parents ☐ Guardian ☐ Legal Custodian ☐Home of Relative ☐ Responsible Adult B. ☐Placement in NON-secure custody at (Specify): Theda Clark Hospital ☐ Home Detention Requested ☐ Rules Issued. • • •
Intake Worker—Dan Venne 26. Signature—
27. Authorization Date & Time—1-22-83 4:15 P.M.

INTAKE OFFICE

(NON-LAW ENFORCEMENT REFERRALS)

2. County— Code— Last Name—DeShaney First—Joshua Middle— 4. Alias/Nickname—Josh 5. Age—3 6. Birthday—03/21/79 Sex [X] M ☐ F Address—110 Wright Avenue, Apt. #4, City—Neenah State—WI 8. County—Winnebago 9. 1 white 2 black 3 Native Am 4 Span Am 5 Oriental Race 6 Other — [1] 11. School Attended/Place of Employment—
12. Grade/Occupation— Father (Natural, Step, Foster)—Randy A. Address 110 Wright St. #4, Neenah Mother (Natural, Step, Foster —Melody Address—Unknown Telephone—Home none Marital Status—divorced Legal Custodian/Supervising Agency—Randy A. DeShaney Address—110 Wright St. #4, Nennah Telephone—Home none Marital Status—divorced Referring Agency —Winnebago Co. Dept. of Soc. Serv. 17. Office Telephone —725-7781 18. Name of Referring Officer—Ann L. Kemmeter 20. File Case No.—FS-17576-CW. In January of 1982, the Access Unit of this Department was contacted by a Christine DeShaney concerning the welfare of Joshua DeShaney, who at that time was in the custody of his father Randy. Christine was concerned that Randy had hit Joshua causing marks on Josh's body. At that point in time, Randy had given physical custody of Joshua, to Joshua's grandfather living in Stevens Point so services were not needed. In March of 1982 Randy and Christine DeShaney attended Marriage Assessment Group offered by Family Court because of their pending divorce.

Referral to Court Intake (Cite statute no.(s) if known)

Whose has been the victim of physical abuse including injury which is inflicted by another by other than accidental means. Joshua was admitted to Theda Clark Hospital by his primary caretaker and aunt, Marie DeShaney because of numerous bruises on Joshua's body. Allegedly the bruises were caused when a two year old playmate struck Joshua with a metal toy truck. According to the attending physician's examination there was a suspicion of child abuse and the matter was to be investigated. • • •

State of Wisconsin
Circuit Court—Branch
Children's Division

NOTICE OF HEARING

TO: RANDY E. DESHANEY
34 W. Tennessee Avenue
Oshkosh, WI 54901

1. Court Case No.—84 IV 155 2. County—Winnebago 3. Case Type ☐ Delinquent [X] In Need of Protection/Services ☐Ordinance/Civil Law Violation ☐ Other—Specify: 4. Intake Case No.—JI 202 5. In the Interest of: JOSHUA E. DESHANEY 6. Birthplace—3/21/79 7. Hearing Location: Room 194, 420 Jackson St., Oshkosh, WI 8. Hearing Date—May 7, 1984 at Time 11 a.m. 9. Notice is hereby given that on the date and at the time and place stated above, the Court, LEO W. MACK, CT. COMM. presiding judge, will hear a petition describing this matter, a copy of which is attached.

The proceeding will be of the following type: INITIAL APPEARANCE.

You may appear alone or with an attorney of your choice. If the hearing is for "waiver of juvenile jurisdiction," the child must be represented by counsel.

If the child, the parents or other interested parties are unable to retain a lawyer because of financial reasons, the State Public Defender may appoint an attorney to represent them at public expense. If a question of ability to pay is raised, proof may be required to justify the payment at public cost. The parents or legal guardian of the child may be ordered to reimburse the state or county for the cost of legal counsel provided to the child based on ability to pay.

10. By the Court: Illegible name, Presiding Judge/Clerk of court. 11. Date of Notice 4/26/84 12. Form of Service Ordered by the Court—[X] Regular Mail—Date Sent 4/26/84 ☐ Personal Service—Date Attempted/Delivered—☐ Certified Mail—Date Sent————

cc: Father: Asst. C.C.; Ann Kemmeter; Atty. Pat Seubert, G.A.L.; and Public Def.

State of Wisconsin
Circuit Court—Branch
Children's Division

ORDER APPOINTING COUNSEL
OR GUARDIAN AD LITEM

FOR OFFICE USE ONLY 1. Court Case No. 84-JV 155 2. County—Winnebago 3. Case Type—☐ Delinquent [X] In Need of Protection/Services ☐ Ordinance/Civil Law Violation ☐ Other Specify———— 4. Intake Case No.—JI 202 In the Interests of: JOSHUA E. DESHANEY, a person under the age of 18. Child's Address—Mercy Medical Center, 631 Hazel St., Oshkosh, WI 54901 Reasons for Appointment—Check all that apply: ☐ Child re-

quested Counsel ☐Court on its own motion has determined that Counsel should be appointed [X] Appointment of Guardian Ad Litem for the child is desirable within the meaning of S. 48.23(3)(3m) 8. Name of Attorney Appointed—PATRICK SEUBERT 9. Type of Appointment—☐ Counsel [X]Guardian Ad Litem 10. Hearing Date—May 7, 1984 Time at 11 a.m. 11. Presiding Judge—LEO W. MACK, CT. COMM. 12. A petition has been filed relating to 48.13(10) against the above-named child.

IT IS ORDERED THAT, for the reasons above specified, the above-named Attorney, who is admitted to practice in the State of Wisconsin, is hereby appointed to serve as Counsel or Guardian Ad Litem for the child as indicated above and is to be present in Court on the date at the time specified. 12. Judge Presiding—BY THE COURT: LEO W. MACK/s/ 13. Order Date—4/26/84

CONSENT TO ACT

Attorney Note: Please sign and return the original copy to the Clerk of Court or the Clerk of Court for Juvenile Matters. I hereby accept the above appointment and will discharge the duties thereof to the best of my ability.

14. Attorney's Signature—PATRICK SEUBERT /s/ 15. Acceptance Date—4/26/84 cc: Father; Asst. C.C.; Ann Kemmeter; Atty. Pat Seubert, C.A.L.; and Public Def.

ATTACHMENT "I"

Complaint Report
Police Department
Neenah, WI 54956

Complaint No. 236606
Winnebago County Department
of Social Services Jan 27, 1982

INFORMATION 3. Classification— Location of Complaint—114 Winneconne Avenue 5. Area Classification—Variant or Business Name—Christine DeShaney 7. Phone No.— Variant Address—114 Winneconne Avenue Person Reporting Complaint—Dave Krizensky 10. Phone No.—Person's Address— Date and Time of Occurrance—01-31-82 13. Date and Time Reported—01-25-82 10:12 A.M. How Reported—phone 15. Shift Commander—Homan 16. Units Assigned 17. Dispatcher—Candy 19. D.O.B. 21. Phone No.—

SGT POHLMAN received a call from DAVE KRIZENSKY who stated his client CHRISTINE DESHANEY is serving divorce papers on her husband, RANDY DESHANEY next Monday 01-31-82.

RANDY has a 2 year old son with him that is from his previous marriage. The mother of the boy is in Wyoming. In the past RANDY has hit the boy causing marks and is a prime case for child abuse. CHRISTINE is afraid that when she leaves next Monday and leaves the boy alone with RANDY something may happen. They both just wanted all of this information on record as they will now be reporting this to the Department of Social Services.

Assigned Officer & No.—Illegible Name 24. 2nd Officer & No— 25. Supervisor & No.—Lt. Homan 135 26. Date—01-25-82 27. Assigned to—N.D. 28. By Supervisor & No.—Parratt 5 29. Date—1-21-82.

ATTACHMENT "J"

Deponent	Date(s)	Pages
Ann Kemmeter	8/27-29:85; 10/1/85; 10/3/85	691 (5 volumes)
Cheryl Stelse	10/2-3/85	242 (2 volumes)
Tom Hoare, MSW	9/10/85; 9/24/85	128 (2 volumes)
T.L. Bowers, M.D.	9/10/85	98
Patrick Busha	9/10/85	46
R. Gehringer, M.D.	9/11/85	82
P. Pleuddeman, M.D.	9/11/85	26
Paul Michler	9/11/85	31
Keith Nelson	9/12/85	82
Ann Marshall	9/25/85	54
A. Sagmeister	9/25/85	28
Ruth Davis, MSW	9/25/85	42
John Bodnar, Esq.	9/25/85	59
Chris Howe Feaks	9/24/85	69
D. DeRozier, Ph.D.	10/3/85	70
H. DeMorest, M.D.	9/11/85	15
Marie DeShaney	9/11/85; 9/26/85	210 (2 volumes)
Pete Donner	10/2/85	22
Melody DeShaney	10/24/85	231
Myrna Bridgewater	10/24/85	91
Linda Brekke	11/20/85	132
Steven Bavolek	11/22/85	136

Marsha Salus	11/26/85	115
Chris Holmes	11/25/85	27
Richard Krugman, M.D.	11/19/85	140
Helen Woodard	12/12/85	51
Linda Krach, M.D.	1/29/86	89
Cheryl Huenink	1/25/86	199
Marc Letellier, M.D..	1/29/86	59
Bashar Kayali, M.D.	1/29/86	49
Douglas BeSharov	1/31/86; 2/1/86	252 (2 volumes)
G. Leutterman	1/26/86	176

ATTACHMENT "K"

MEMO TO JUVENILE COURT INTAKE

January 27, 1983

To: Juvenile Court Intake

From:_____

Ann Kemmeter, Agency Representative
Winnebago County Department of Social Services

Re: Joshua DeShaney, d.o.b. 3/21/79 (3)
110 Wright Avenue, Apt. #4
Neenah, Wisconsin 54956
No Phone

BIRTH FATHER: Randy A. DeShaney, d.o.b. 1/3/58 (25)
110 Wright Avenue, Apt. #4
Nenah, Wisconsin 54956

BIRTH MOTHER: Melody DeShaney
Whereabouts Unknown

PRIMARY CARETAKER: Marie DeShaney, d.o.b. 12/9/59 (23)
110 Wright Avenue, Apt. #4
Nenah, Wisconsin 54956

REASON FOR REFERRAL:

The Winnebago County Department of Social Services initially alleged that Joshua DeShaney was the child alleged to be in need of protection and services under Wisconsin Statutes 48.13, who has been the victim of physical abuse including injury which is self-inflicted or inflicted by another by other than accidental means. Temporary physical custody was granted to Theda Clark Regional Medical Center on January 22, 1983, at 4:15 p.m. The child was hospitalized pending a complete investigation of the numerous and unexplained bruises that appeared on Joshua's body.

PRECIPITATING SITUATION:

Joshua was admitted to Theda Clark Regional Medical Center on Saturday, January 22, 1983, at 1:34 p.m. by his primary caretaker and aunt, Marie DeShaney, stating that another child of approximately two years of age, struck Joshua on the forehead with a metal truck. Joshua had a bruise approximately three inches in diameter across the forehead with a textured pattern on the surface. There was another blue bruise on his right cheek, along with an abrasion, a small abrasion on the back of his head, a bruise the size of a 50¢ piece on the left scalp, smaller bruises down his spine and arms. Several of these had a dotted texture pattern to the bruises. Joshua also had bruises on his arms and legs and a bruise across both buttocks,

upper thighs, ankle and heel. Dr. Gehringer, pediatrician from the Nicolet Clinic, examined the child and recommended that the child be admitted to the hospital because of the multiple contusions with possible child abuse. Tom Hoare, social worker at Theda Clark Regional Medical Center, contacted me as well as the Neenah Police Department, Det. Keith Nelson, to assist in the investigation. The father of the child was out ice fishing and therefore unable to give immediate consent for the child to be hospitalized. We requested temporary physical custody for placement at Theda Clark Regional Medical Center which was granted by Dan Venne, Intake Worker, at approximately 4:15 p.m. in the afternoon.

Complete statements from Marie DeShaney, the primary caretaker, and of Randy DeShaney, birth father of the child, were taken by Det. Nelson that same afternoon in my presence. A copy of their statements as well as the report from Det. Nelson are attached to this memo. Basically, even though the two did not have time to corroborate their stories, they appear to be in agreement regarding Joshua's behavior, the types of disciplinary techniques used with the child, and expectations of the child. Both of them deny abusing the child and further both stated that they had intentions of contacting a pediatrician from Nicolet Clinic on Monday, January 25th to make an appointment for a complete physical for Joshua because of the extensive bruises on his body and the fact that they were not healing very quickly. Det. Nelson and myself found Marie DeShaney and Randy DeShaney to be very cooperative in the sharing of information.

On Monday, January 25th, Tom Hoare, social worker from the hospital, and myself again interviewed Randy De-

Shaney, Marie DeShaney, and Randy's ex-wife, Christine DeShaney. Once again all three were very cooperative and open in sharing information with us and there appeared to be no basis to the establishing of child abuse or child neglect. Rather, it appears they were lacking in parenting skills and may not have provided adequate supervision to Joshua and two other children Marie takes care of, her son Rusty and a two year child by the name of Andy. Andy is the son of Claudette Goetsch. Det. Nelson also interviewed neighbors of the DeShaneys who share the same apartment building with their responses being that while they hear crying and they hear fighting, they do not hear any clapping or constant screaming so as to indicate that a child was in danger.

Both Marie and Randy also felt that Joshua's behavior has been deteriorating for the last month and one-half with more enuresis and encopresis. He seems to be playing rougher and will pull his hair out of his head, especially when father is leaving. There are two bald spots on each side of the child's head about two inches in diameter each. Both Marie and Randy also indicate the child is biting himself and pinching himself. In view of that information, a request was made for a complete psychological exam to be completed by Mr. Donald Derozier.

CHILD PROTECTION TEAM MEETING AND RECOMMENDATION:

On Tuesday, January 26, 1983, a Child Protection Team meeting was held with staff from the emergency room and pediatrics being present, along with Dr. Donald Derozier, clinical psychologist, Dr. Gehringer, pediatrician, Tom

Hoare, social worker, Cheryl Stelse, supervisor of the Child Protective Service Unit, John Bodnar, Assistant Corporation Counsel for Winnebago County, Det. Keith Nelson of the Neenah Police Department, and myself. The general consensus was that this child had not been physically abused, but undoubtedly had not been parented appropriately, thereby being hurt possibly by playmates or by himself. Dr. Derozier felt that the hair pulling was a result of acuate anxiety on the child's part when father left the home to go fishing or go on errands. The child had lived with his birth mother until 14 months of age, and there is strong suspicion of alleged neglect and possibly abuse during his infancy. Dr. DeRozier felt this could account for the anxiety in the child today. It was the recommendation of the Child Protection Team that the child be returned to the father, that he live independently of the primary caretaker, Marie DeShaney, that the child be enrolled in a preschool program, preferably Headstart, and that the father continue to work with the Department to increase his knowledge of child development as well as to increase his parenting skills. Randy DeShaney entered in a social service agreement indicating that he would be more than happy to cooperate with the Department and would be accepting of any and all help that would be made available to him. Dr. Gehringer would like to follow this child for the next several months with the next appointment in two weeks and thereafter, every two months for an indefinite period of time.

I therefore recommend that the temporary physical custody order and any further allegations against this family be dismissed at this time but will refer it back into Court

should there be any further injuries to this child of an unexplained origin.

The father signed releases for Consent of Medical Information and upon my receipt of such, I will forward it to you for your records.

AK/la

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

(Caption omitted in printing)

AFFIDAVIT

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

WAYNE M. YANALKA, being duly sworn on oath deposes and states as follows:

1. That he is an attorney licensed to practice law in the State of Wisconsin and is associated with the law firm of Simarski & Stack, Ltd., attorneys for defendants, Ann Kemmeter and Cheryl Stelse, in the above-referenced action.

2. That on January 31, 1986 and February 1, 1986 plaintiffs' counsel conducted the deposition of Douglas Besharov; that attached hereto and marked as Exhibit "A" are excerpts from said deposition which are incorporated herein by reference as if fully set forth.

3. That on August 27, 1985, August 28, 1985, August 29, 1985, October 1, 1985 and October 3, 1985 plaintiffs' counsel conducted the deposition of the defendant, Ann Kemmeter; that attached hereto and marked as Exhibit "B" are excerpts from said deposition which are incorporated herein by reference as if fully set forth.

3. That on September 25, 1985, the deposition of Ann W. Marshall was conducted; that attached hereto and marked as Exhibit "C" are excerpts from said deposition

which are incorporated herein by reference as if fully set forth.

4. That on September 25, 1985, the deposition of Ruth A. Davis was conducted; that attached hereto and marked as Exhibit "D" are excerpts from said deposition which are incorporated herein by reference as if fully set forth.

5. That on September 11, 1985 and September 26, 1985 the deposition of Marie E. DeShaney was conducted; that attached hereto and marked as Exhibit "E" are excerpts from said deposition which are incorporated herein by reference as if fully set forth.

6. That on September 11, 1985 the deposition of Robert E. Gehringer, M.D. was conducted; that attached hereto and marked as Exhibit "F" are excerpts from said deposition which are incorporated herein by reference as if fully set forth.

7. That on September 10, 1985 the deposition of Timothy L. Bowers, M.D. was conducted; that attached hereto and marked as Exhibit "G" are excerpts from said deposition which are incorporated herein by reference as if fully set forth.

8. That on January 29, 1986 the deposition of Marc Letellier, M.D. was conducted; that attached hereto and marked as Exhibit "H" are excerpts from said deposition which are incorporated herein by reference as if fully set forth.

9. That on October 2, 1985 and October 3, 1985 the deposition of the defendant, Cheryl F. Stelse, was conducted; that attached hereto and marked as Exhibit "I"

are excerpts from said deposition which are incorporated herein by reference as if fully set forth.

10. That all of the above depositions were taken in relation to the above litigation and that the excerpts therefrom incoroprated into this Affidavit are being filed with the Court in support of the defendants various Motions.

Dated at Milwaukee, Wisconsin, this 7th day of April, 1986.

/s/ Wayne M. Yankala
WAYNE M. YANKALA

(Jurat omitted in printing)

EXHIBIT A

(p. 144) function and role of the social worker changes. This is just my own internal—it saves me writing a lot of words. I know exactly what that means.

Then I said, "In family service mode Ann K. said she was not looking for facts."

Q. Where did that come from?

A. It came from Mr. Yankala's description to me of what she—I guess what she said she did in that mode.

That's the sum total of my briefing this morning.

Q. This expression that in—as your handwritten note says, "In family service mode, she was not looking for facts."

What does "she was not looking for facts," mean?

A. It means she was there not as an investigator—I'm taking it to mean—but as a therapeutic counselor.

Those are my words.

Q. How does that tie in with the circumstances you described earlier of where a case worker by firsthand observation acquires information that triggers an obligation to act?

How does this business of not looking for facts fit in?

A. All therapeutic counselors or social workers are under an obligation to report suspected child abuse.

In that mode, Ann Kemmeter becomes, like any other responsible, legally mandated social worker, case worker. So (p. 145) it's not—the phrase is not mine. I don't know if it's Ms. Kemmeter's or what.

The point is, she is not an investigator. She's a therapeutic counselor at that stage, but she has the legal powers only of a therapeutic counselor, which are zilch except for reporting suspected child abuse.

Q. Where the now social worker, to use your description of it, comes into possession of information that calls for digging into the facts, is she supposed to go fill out a report and have a different person make the investigation, or is she supposed to follow up directly herself?

How should that be done?

Mr. Yankala: I'm going to object to the question as vague as to whether you mean it in the context of the 48.981 report that would trigger the legal duty to investigate or whether it's some other sort of investigation you're referring to.

The Witness: I was taking it as legal duty to investigate. That's how I was interpreting the question.

I'm not sure how it works in Winnebago County and I wouldn't presume to guess.

In most large metropolitan areas there is a separate family service there. Which, by the way, would—so it clarifies the division here, that it would—it makes the workers' more limited responsibility much clearer.

* * *

(p. 250) that she had concerns.

I think that's right. If that's what you are looking for. She wanted some help. It's also of the fact that she kept trying. She was doing everything she could, and more so, it looks like.

Q. I want you to assume, please, that in November and December 1983, that Ms. Ann Kemmeter and her team mate—

A. Oh, I'm sorry, was the team mate appointed in the early stages, during that time when the team met?

Q. No, no, November of '83, which would be ten months later.

A. I'm sorry.

Q. Assume that in November and December of '83, both Ms. Kemmeter and her team mate, both harbored strong suspicions, or to phrase it, with the noun—with the verb "strongly suspected" that Joshua was being abused.

If that should be the case, would that trigger any obligation in your view?

A. I think we, a little bit, went through this yesterday.

If they had the kind of—is the testing in Wisconsin, reason to suspect, or reason to believe, for report of child abuse?

Maybe we ought to lock in that right now?

Q. You have the statute.

(The witness peruses the document.)

(p. 251) A. Okay, there's reasonable cause to suspect.

Assuming, as I talked about yesterday, they had reasonable cause to suspect. They had it. They suspected it, subjective, we're talking about a subjective test. And that reasonable cause was not overriden or negated or whatever the word would be, by the fact that the team had met on very similar information and said there was nothing to proceed on.

Assuming that there was an independent life to that suspicion, independent of the facts and the kinds of facts, kinds, not exact facts, that had been fully hashed out with the committee, then a reasonably diligent child protective investigation should have been commenced.

Mr. Sullivan: I think we have arrived at the pumpkin patch.

Mr. Mingo: Does that mean you're done?

Mr. Sullivan: I sincerely thank you very much.

Mr. Mingo:: I will feel comfortable if you waive signature.

The Witness: : I'll waive it, then.

(Whereupon, at 12:25 o'clock, p.m., the taking off the deposition of DOUGLAS BESHAROV was concluded.)

EXHIBIT B

(p. 113) Q And did you accept that as being accurate?

A Yes.

Q Did you visit Joshua and find cigarette burns on his face?

A I suspicioned that they may have been cigarette burns.

Q When did you make that visit?

A On November 9th, 1983.

Q What explanation did you get for what you believed to be cigarette burns on his face?

Mr. Mingo: Well, just a second. That's a misstatement of her testimony. Her testimony was not that she believed them to be but that she had a suspicion they may have been.

BY MR. SULLIVAN:

Q Did you write a report that you believed they were cigarette burns?

Mr. Mingo: If you want to look at your reports—

The Witness: There not here.

Mr. Mingo: If he wants to ask you that question, take time to go get your report.

Mr. Sullivan: We've had enough stalling and bullshit today. We'll finish up for today.

Mr. Mingo: We're not going to have anymore comments like that on the record. I don't want that type (p. 114) of language used in front of my client, and I don't like the implication, and I don't want it to happen again.

Mr. Sullivan: I don't like the implication either, Mark.

Mr. Mingo: Then don't make it. That was totally uncalled for.

Mr. Sullivan: We agree to disagree.

BY MR. SULLIVAN:

Q On the occasion that you saw burns or what you took to be cigarette burns on Joshua's face, what explanation was given to you?

A Again, I would like to state that that was purely a suspicion of mine that they may have been cigarette burns. I was told by the family that Joshua had been outside and that he had scraped his chin on the sidewalk.

Q Where were these what you took to be cigarette burns or what you suspicioned to be cigarette burns, where were they located?

A On his lower jaw of his chin. In this area. How can I describe it?

Q Well, you saw it, and I didn't, so please describe it as best you can in words.

A They were noticeable on the—the bottom of his jaw towards the front, going towards the front to his chin, front of his chin.

* * *

(p. 6) University of Wisconsin-Oshkosh.

Q When did you graduate from Neenah High School?

A 1961.

Q That would have been in the spring?

A June of '61, right.

Q And did you enter UW-Oshkosh in the fall of '61?

A Yes, I did.

Q I take it from the fact that you attended that you didn't graduate directly in an unbroken sequence; is that correct?

A From the high school I entered UW-Oshkosh and remained there until I graduated in 1966.

Q And your bachelor's degree was in psychology?

A That's correct.

Q Would you describe for me generally the areas of course work that you studied in your bachelor's program.

A When I began my college education, I had started in lower elementary education. I changed my major to psychology. So I have a number of educational credits as well as those required for the degree in psychology.

Q Did some part of your bachelor's program involve social work courses?

A Social work, no. The university did not have a social work department at that time.

Q Did you live at home when you went to UW-Oshkosh?

* * *

(p 12) A No, I have not.

Q Is this the first marriage for each of you?

A Yes, it is.

Q In addition to your high school diploma and your Bachelor of Science Degree in psychology, have you taken any other formal credit educational programs?

A Yes, I have.

Q Would you tell me about those, please.

A They were credits at a graduate level in the field of social work.

Mr. Mingo: Read back the last question and the last answer, please.

(The last question and answer were read.)

Mr. Mingo: Are you looking for some document in the file in front of you?

The Witness: I was looking for the transcript of the graduate credits.

Mr. Mingo: And you don't have that?

The Witness: Apparently it's not in my personnel record.

Mr. Mingo: Do you want her to locate that or what?

Mr. Sullivan: What I'd suggest we do is at the break—

* * *

(p. 18) although we have access to pamphlets and brochures announcing in-service training, and it is up to us to make a request if there is something of interest we would like to attend.

Q I assume the kind of in-service training you get consists of both things that are done here and maybe programs outside as well?

A Correct.

Q Have you over the years availed yourself of either or both of those kinds of in-service training?

A Yes, I have.

Q And who keeps record of what programs you've participated in and what training credits you've earned?

A Basically, I do.

Q Does somebody in— Is there a personnel officer in your department or somebody with personnel functions?

A Correct.

Q If you go— Well, let's just say, for example, that there's a half-day program conducted in the department, and you attended. Are you supposed to write a letter or something like that so they have a record that you attended?

A If it were a mandatory meeting, there would not necessarily be a record kept. If it was an optional meeting, it would be up to me to make a request to my

• • •

(p. 26) Social Services, I believe, even since I was hired back in 1967, has always had some type of a satellite office in the Neenah-Menasha area, so there have been several moves from various office places. When we moved into this particular building. I don't recall the year.

Q Have you— Let's say since 1981, have you been assigned working out of whichever address they were using for a satellite in the northern end of the county?

A Have I worked the northern end of the county since 1981, is that what you're asking?

Q It wasn't, but let me ask you that first. Since 1981 to the present, have you been working the north end of the county?

A Yes.

Q Okay. And since 1981 has your own office, your personal office, been up in the Neenah-Menasha area?

A Yes, it has.

Q As opposed to here in Oshkosh?

A Yes.

Q And there have been moves, but when you were at which address is unclear?

A I don't recall.

Q Okay. How far is Neenah from the Oshkosh DSS office?

A Fifteen miles.

Q That's not a flippant question. I'm not familiar.

• • •

(p. 34) your degree and coming to this department?

A Yes.

Q When did you go to work at Bethesda?

A September of 1966. I don't recall the exact date.

Q That's fine. What did you do over that summer?

A Over that summer I reached for full-time employment.

Q And what was your reason for desiring or choosing to leave Bethesda?

A Primarily because I missed the Fox River Valley area. This is where I was born and raised and wanted to return back to this area in general.

Q In addition to applying to the Winnebago County DSS, did you make any other efforts to find employment back in the Fox River area?

A If I recall, I wrote a letter to the Fond du Lac County Department of Social Services and Outagamie County Department of Social Services.

Q What became of those inquiries?

A I really don't recall.

Q Would you tell me what in-service training programs you remember, let's just say in the last five years,

you remember that you've participated in either internally or outside.

A I have attended several. They have included—

Q Let me interrupt to make it easier for you. This isn't a (p. 35) memory test, and it's not points off if you leave one out. I'm only asking for the ones that you're able presently this morning to remember.

A I recall attending the—a National Conference on Child Abuse and Neglect in Milwaukee, I recall attending a session in Appleton on child sexual abuse with Dr. Zaphirus, I recall attending a seminar in Appleton, again, of, I believe, the title was to the effect of children raised in alcoholic families and the effect. That was by Claudia Black.

There were several that I have attended sponsored by the mental health—Winnebago County Mental Health Institute to include, I believe, acute anxiety attacks. I believe there's something on depression, there have been a number of them, and I'm sorry, I don't really recall all of them in the last five years.

Q Okay. These ones that you mentioned that do bring themselves to mind, they're all, I take it, in approximately the last five years?

A Yes.

Q I assume that if we go back eighteen years, you've been to others, but it's not a memory test.

A I certainly have.

Q You say that you went to a seminar in Appleton on—generally on alcoholic families and the effect of that on

• • •

EXHIBIT C

(p. 20) anything really significant on the emergency room report that wasn't on the reporting form.

Q Did you indicate to Ann what the diagnosis of Dr. Bowers was?

A At that time all I could tell her is about the laceration, yes.

Q And what did you tell her the diagnosis of Dr. Bowers was?

A I would have told her just this, the right forehead laceration, I would have described what was found. There is no official diagnosis on this form, or—well, here it is, laceration of forehead, that is here.

Q You would have—

A I would not have said, "The diagnosis is."

Q What would you have said?

A I would have said all these things here that are on the abuse report. See, there's additional information.

Q You would have told her what is handwritten after the subheading, "Nature of child's condition"?

A Yes.

Q And you would have said, "Right forehead laceration," and what you previously read to us?

A Yes.

Q Was it your understanding that there had been a formal diagnosis of child abuse in this case on November 30, (p. 21) 1983?

A That there was?

Q Yes.

A No.

Q When one of these reports such as the one that we've marked as Exhibit A—strike that. Can you tell me whether—strike that.

When a report such as the one that we've marked as Exhibit A is generated within the hospital and eventually comes across your desk, does that necessarily mean that there has been a diagnosis of child abuse?

A It does not.

Q Can you tell me how common it is for you to see one of these reports come across your desk, in other words, is that something rare or something that happens quite often at Mercy?

A I will give an estimate, I don't know exactly, but I would estimate there may be two or three per month.

Q And when you receive these reports, do you always follow through with them in the same manner as you told us you did in the DeShaney case?

A Generally I would say, yes.

Q Do you recall whether or not you had any additional contact with Ann Kemmeter relative to the November 30, 1983 hospital visit other than what you've told us about?

* * *

EXHIBIT D

(p. 23) A Where I repeated the information to her.

Q Tell us what you remember about that conversation, who said what to whom?

A Oh, my goodness.

Q You know, as best you can?

A I don't think I can remember any—

Q I'm not asking you to quote anybody, tell us what that conversation was about?

A I just told her that I had found Joshua alone the day before and that I had put in a phone call to her and that I felt that she should know this information, that it should be a part of her record that I had found the child alone, and that I told her that I would back that conversation up with a letter.

Q And the reason for that was what?

A For documentation, that it should appear that the child was left alone on that date, and that in my opinion that this constitutes I think a neglectful situation.

Q And did she ask you for that documentation?

A I am not sure whether she asked for it or I told her I was sending the letter. I cannot remember which of the two it was. I can't remember.

Q Did she tell you anything about how come you hadn't heard from her before the next day?

A Other than she didn't get the message until that morning.

(p. 24) Q Did she indicate anything to you either about how come she didn't get the message or what her reaction to that was?

A No. No. No, the only thing that she did tell me is that if I had a situation like that in the future it would probably be wise for me to have gone either to the police or to another person in the department, so make sure my message got through.

Q Instead of just a switchboard kind of person?

A That's right.

Q I just used the word switchboard, and maybe that's not fair. Were you going through a county operator or—

A No, I was talking to a person answering the phone at the department in Neenah.

Q Do you know what that was?

A No, I don't.

Q Or did you know at that time?

A No.

Q It was a stranger to you?

A She was a stranger to me.

Q Did you and Ann discuss Joshua's status and the question of whether he was being neglected or properly cared for?

A On that visit or on that phone call?

Q Well, in this couple of days you're telling us about?

A Could you be more specific?

* * *

EXHIBIT E

(p. 58) Q Okay. And what, if anything did she say to you about this fainting and the headaches and so on?

A She didn't say too much because I told her if it kept up, I was going to take him to the doctor. I believe that took care of that.

Q Did you mention to her how long it had been going on?

A Yes, I did.

Q You had some discussion with Mr. Yankala about an injury on Joshua's face, his chin I think, if I remember, that either was a cigarette burn or a sidewalk burn and it's not clear to me which. Do you remember talking about that?

A Yes, I do.

Q Is that the time that Mrs. Kemmeter asked you if that was a cigarette burn?

A Yes, she did.

Q What did you tell her?

A I told her, no, it was not a cigarette burn.

Q Did you explain to her what it was?

A I told Joshua to tell her what it was.

Q What did he tell her?

A That is was from scraping his chin on the sidewalk.

Q That's the one you told us about where he I guess knelt down on his hands and knees and was rubbing his chin?

A Yes.

* * *

(p. 108) Q What do you remember about her?

A Nothing real special.

Q She just seemed to tag along sort of?

A Yes.

Q Did you have any talks with her or was she just there while Ann was talking?

A I believe they mentioned a couple things, but I don't remember exactly what it is.

Q, She was polite enough?

A. Yes.

Q One of the things that happened was that the Headstart lady came to the house one time and Joshua was the only one there. Do you remember about that?

A Yes.

Q What do you remember about that?

A Joshua didn't want to go down to make a phone call with us, which is only three blocks away, and he said he just wanted to take a nap and sleep. So we said,

"Fine," because we'd be right back. We knew he wou'dn't get in trouble or nothing.

Q Where did you have to go to make that phone call?

A Up to Main and New York. Right on the corner there.

Q Is there an outside pay phone?

A Yes, there is.

Q And somebody went with you. Who was that?

(p. 109) A Randy and Rusty. We all went except for Josh.

Q What was that about?

A I think we went to call Randy's dad, I think.

Q Do you remember for what?

A Just to talk to him, I guess. Randy wanted to talk to him, see how he was doing.

Q How did Joshua get along with his grandfather?

A Great.

Q Did he know you were going to call grandpa?

A Yes.

Q And so about how long do you figure you were down doing that?

A I'd say about 15 minutes.

Q Did you walk or did you take the car?

A Walked.

Q Sometimes when lawyers ask people questions they go down their own lists and completely miss the

point, and between us we have covered a lot of stuff. I appreciate how helpful you have been. So far as all the stuff that happened with Joshua and talking care of him and all the accidents and injuries and those kinds of things, is there anything that you remember that you think is important that you haven't told us about?

A A couple things.

Q What would those be?

• • •

EXHIBIT F

(p. 49) A That's right.

Q And you found no further signs of child abuse or possible child abuse on January 31, 1983?

A That's right.

Q What was your opinion on January 31st of 1983 as to whether or not this was an abused child?

A It was no different than on the 25th.

Q Then according to your notes there was next an emergency room visit on March 14th of 1983?

A That's right.

Q What was that all about?

A Joshua had a facial laceration.

Mr. Sullivan: This is March 14th you're speaking of?

The Witness: March 14, 1983. Joshua was seen by the emergency room physician, Dr. DeMorest.

BY MR. MINGO:

Q This was again at Theda Clark?

A At Theda Clark.

Q Before we get on with that, let me ask you this: Were you somehow sent all the reports every time Joshua entered the emergency room at Theda Clark?

A They're sent to his chart. I would not be made aware of those.

Q Sent to his chart where?

(p. 50) A There's a record, this record. This file copy is sent to the Nicholet Clinic to be entered in Joshua's medical record. It doesn't come across my desk.

Q You could go to that chart from time to time to see whether or not there were any subsequent emergency room visits?

A That's right.

Q Can you tell us what that emergency room visit was about on March 14th of '83 at Theda Clark?

A He had a laceration of his forehead.

Q And was seen by Dr. DeMorest?

A Right.

Q Is there any indication in the hospital records from Theda Clark of March 14, 1983 indicating child abuse or possible child abuse?

A Not on the record that I have.

Q And the record you have is what? What's that called?

A The emergency room sheet. There would probably be a dictated report that I would not receive.

Q What was the next hospital contact that Joshua DeShaney had according to your office notes?

A The next hospital contact was on May 8th when he had the sutures removed. I had put those sutures in on the 3rd in my office.

Mr. Sullivan: Off the record.

(p. 51) (Discussion off the record.)

BY MR. MINGO:

Q Before we get into why he was in the hospital, when was the next time Joshua was seen either by you or at a hospital for any reason according to your Nicholet Clinic office notes?

A Okay. I saw him on May 3rd, '83. He had presented, apparently, to the emergency room. They contacted my office and sent him to my office.

Q Would that have been the emergency room at Theda Clark?

A That's right. I believe so. I'm not positive of that, but I believe so. He had reportedly been playing with his wagon in the apartment and fell injuring his lip. He had a laceration of his upper lip that required several sutures to close the laceration. I recommended that his sutures be rechecked in four days and I notified his social worker regarding the injury.

Q Would this notification of the social service worker—Strike that.

The social service worker is someone from the county or someone from the hospital?

A Someone from the county. I would have called them on the phone.

Q And we don't have any record of what you said to the social service worker?

(p. 52) A No.

Q Can you give us some indication of what you said to the social service worker?

A That Joshua was again in my office, that he had not been to my office for his three or four week scheduled visit, but that he had had a laceration in the emergency room previous to me seeing him and I was seeing him again for a laceration.

Q Were you of the opinion that the injury of May 3, 1983 was an injury that occurred by accidental means or did you feel that that was another abuse situation?

A I felt that particular injury was probably by accidental means in that the history relating to it was appropriate and that falling on a wagon could certainly cause a laceration of that sort.

Q So you didn't indicate to the social service worker that you had any further suspicion of child abuse as of this time in that case, namely, May 3rd of 1983; is that correct?

A I don't remember stating it exactly like that. I'm sure that I told her that he had not—he had missed his appointment and that this was his second injury and that I was concerned about the injuries.

Q I'm not saying you made that statement, but I'm wondering did you make any statements indicating that you had new (p. 53) or further suspicions of child abuse as of—

A Yes, in that he's had two more injuries.

Q He had the injury of May 3, 1983; correct?

A Yes, May 3rd and March 14, '83 which I didn't see him for, but had record of at that point.

Q The May 3rd, 1983 injury you thought was by accidental means, not because of child abuse you told us, right?

A That's right.

Q And the March 14th of '83 visit, did you think that somehow involved child abuse?

A The information I had on that was very cursory. My concern was that a child who we had been worrying about child abuse because of injuries had two more injuries.

Q You were reporting all the injuries as they occurred to the social service worker?

A That's right.

Q Then there was—Strike that.

If at any point in time subsequent to January 25th of 1983 you felt the child was abused once again, was there any action you could take to have the child once again placed in temporary physical custody?

A I could have had him readmitted to the hospital, I'm sure, if my suspicions had been—if I felt that he was

in immediate danger at that point. That was not my opinion.

(p. 54) Q I'm just wondering hypothetically.

A Hypothetically, sure. We would go through basically the same procedure that had been done in January.

Q So if subsequent to January 25, 1983 you thought you were faced with another possible child abuse situation, you could then go back and run through the steps and procedures that you ran through on January 22nd of '83?

A That's right.

Q Now the next contact with a hospital or medical doctor, according to your Nicholet Clinic notes, would have been on May 8th of '83?

A Yes.

Q What was that about?

A Joshua returned to the emergency room and had the sutures removed that I had put in.

Q Did you do that?

A No, I didn't. He saw the emergency room doctor rather than come to my office.

Q Are there records reflecting that visit in your possession?

A Yes.

Q Now I presume that record is from Theda Clark?

A Yes.

Q And that indicates that the sutures were removed?

A That's right.

• • •

EXHIBIT G

(p. 44) Q You have to answer.

A Yes, I have. And I can cite a specific incident in Outagamie County in the last several years. In the last several years the public's index of suspicion of an awareness of child abuse has become greater, and my personal awareness of it has increased, too.

As a result of my work with the alcohol and drug rehabilitation program I am more acutely aware of how much verbal and physical abuse there is and what effect this has on children as they get older and become adolescents and the problems. And in the last year since I've held that role I think I have been more aggressive in getting into the situation of the presentation and finding out if Social Services is involved, and if they aren't, getting them involved.

It's not a crusade by any stretch of the imagination, but my awareness is greater and so I feel like perhaps we can do something, and attempt to do so. I cannot say at this particular time in '83 that I was functioning at my current level of awareness and my current resolve at getting involved.

Q Okay. And you're also telling me that in November of 1983 you didn't pick up the telephone and attempt to reach the Department of Social Services with respect to Joshua DeShaney, correct?

(p. 45) A That's exactly what I'm saying. As a matter of fact, I didn't really fill out the report that went to the Department of Social Services. I specifically avoided filling out that report because it would have given me a greater likelihood of being called to testify.

Q Called to testify in what?

A If this particular incident were to be investigated.

Q By the Department of Social Services?

A By whatever department investigates abuse reports. If the nurse filled out the report, then they most likely would talk to her as opposed to me, and my physical findings as noted are documented.

Q Is that why you did not put a formal diagnosis of child abuse on your written report as well?

A If I have a person who presents with chest pain and I admit them to the hospital because I think they may be having a heart attack but I don't know, I will have done a cardiogram, perhaps some blood studies, and I would dictate a final diagnosis as chest pain of unknown etiology, rule out myocardian infraction.

I have never—I can't say that, perhaps I have—but I don't recall specifically discharging a patient with a diagnosis of suspected child abuse. I have never used those exact words, to my knowledge, in a discharge diagnosis.

• • •

(p. 48) Services, or from Mercy Medical Center, or from some third entity, do you know?

A I do not know where the form comes from. We do, however—I do know, however, that we have the forms in the department.

Q Do you on occasion fill out those forms?

A I have never filled out a child abuse report, no.

Q And you indicated that you did not fill out the child abuse form with respect to Joshua DeShaney, because if you did you might be asked to testify by some investigative agency, correct?

A I would have been more likely—My feeling at that time was having never testified before in this type of agency, was that I'd be more likely to be called to provide information in an investigation if I were the one to have filled out the form.

Q Okay. And I take it by that answer that you did not want to be called to testify; is that correct?

A The rational for not wanting to be called needs to be explained.

Q First of all, you didn't want to be called; is that correct?

A That is correct, I did not want to be called.

Q Now you're going to tell me why?

A That's correct.

(p. 49) (A discussion was had off the record.)

A There are many—One of the reasons I practice primarily in Appleton and live in Oshkosh is because I —and the reason I'm an emergency physician as opposed

to having a private practice, is that I value my free time above and beyond almost everything else. I also value a degree of anonymity and enjoy that anonymity in this community because no one knows I'm a doctor. I can go to the Y or anyplace else and I'm unknown, and I like that type of anonymity.

Not wanting to testify is not that I'm not comfortable with my ability to provide information, it's not that I want to avoid being of service in a situation where service needs to be rendered, it's just plain I didn't want to devote the time to it.

For instance, our problem with scheduling now, you tried to get me on for Thursday. I'm working 24 hours, and trying to get off was impossible. The nurse, however, has a lot of people to cover for her. If she's called to testify, she'll be reimbursed by the hospital, that's paid. She has someone else to cover for her and it's absolutely no problem for them to get the time.

If, however, sometime down the road I'm called to testify and it conflicts with my work schedule, for insance, then it can create some problems. So it's (p. 50) not my reluctance to be of service, but rather the potential for conflict with time constraints in the future that I would at that time not have filled out the report—

Q Okay.

A—myself. And there are other reasons beyond that. I'm the emergency physician in a department where there's one doctor, three RN's, three LPN's and one aide. I see every patient that comes in and I don't have time to sit down and fill out a two or three-page report hand-

written about a case of suspected child abuse at the time. And I know that that report was filled out immediately after that patient left the department.

Q Let's me interrupt you for a second. The question that I want you to be answering now is why you really did not want to testify rather than why you didn't fill out the report, although those two make go hand-in-hand?

A The reason for not wanting to testify is simply the time constraints, I answered that question. I went on to say why I, myself, would not have filled out the report immediately.

Q Okay.

A Even if I had wanted to testify sometime in the future, I wouldn't have filled it out immediately because of the time constraints at the time. I have to keep moving and

* * *

(p. 55) Q Okay. And where it went from there you didn't know?

A That's correct. My understanding of my responsibilty for suspected child abuse is to ensure that a report is submitted of that abuse. I do not—I am not aware that I am obliged to pick up the phone or call the police, or obliged to pick up the phone and call the Department of Social Services at that time, but rather that I am obliged to be assured that a report is sent to the appropriate agency.

Q Who is the appropriate agency?

A Social Services in the hospital in this case. And if I were at St. Elizabeth's I would send it ot the Department of Social Services there, or to pick up the phone and call the Department of Social Services in Outagamie County, they're more readily available than they are in Winnebago County.

Q Where did you get that understanding that all you have to do is see that a report is submitted to Social Services in the hospital and they take it from there?

A I've never received any form of communication from any agency that says, "This is the procedure to follow in the case of abuse."

Q How do you as a doctor know what you're supposed to do in a case of suspected child abuse? In other words, why do you feel in your own mind that all you have to do is (p. 56) submit a report or see that a report is submitted to the Social Services Department in the hospital rather than immediately picking up the phone or personally contacting either the police department or the Department of Social Services?

A Well, what we did in this particular instance was submit a report, and it seemed adequate apparently because no one came back to me and said, you should have done this. So I have no—As I say, no one has ever sent me a communication, no one's ever sat down with me from the Department of Social Services and said, this is the process of reporting—

Q Can I stop you for just a second. When you use the term Department of Social Services in your testimony, are you always referring to the Department of Social Services at Mercy Medical Center?

A I'm referring to the Department of Social Services at the hospital.

Q Okay. And that's something separate and distinct from the Winnebago Department of Social Services?

A I don't really know.

Q I think I interrupted you and I didn't mean to do that. Why don't we have the Court Reporter read back where you were and then you can continue.

A It was pertaining to my understanding of my obligation,

* * *

(p. 69) Q No, not that I know of.

A Then I'm mistaken. But if I had filled out a report, it would essentially have been identical to the report the nurse filled out, and multiplicity of reports doesn't accomplish more than one good succinct concise report.

Q What I'm trying to determine here is exactly what you did with respect to reporting this high degree or high possibility of child abuse. Now is it fair to say that the only thing you did with respect to reporting your high suspicion of child abuse to anyone outside the hospital was to instruct a nurse to fill out this report?

A I instructed Nancy Rolfs specifically to fill out a report.

Q Over and above that you didn't do anything with respect to reporting this, correct?

A Over and above that I did nothing. And I am not aware of anything else that needed to be done or that

should have been done at the time, unless I would have been fearful for the child's immediate well-being, which I apparently wasn't. I wasn't concerned that the child might go home and suffer a lethal or even disabling injury in the next few days.

Q You did not feel that the immediate well-being of the child was in danger at that time; is that correct?

A. That's correct.

* * *

EXHIBIT H

(p. 26) A I think I left the general physical examination up to Dr. Kayali, but I was there as we, for instance, counted the old bruises and what we observed.

Q Do you recall at this time where you observed the old bruises?

A Vaguely, but—

Q Maybe if you look at page 2 of the discharge summary, I believe it's summarized.

A Physical exam in the emergency room.

Q Is that where those notes came from that were put into the discharge summary?

A This is what I'm looking at, discharge summary, page 2.

Q With respect to the statements contained in that document, it indicates that there were multiple bruises on the lower extremities and buttocks and face on the right

forehead. With respect to the multiple bruises on the lower extremities, can you tell me where they were observed?

A You mean when they were observed?

Q No, where on the lower extremities? Were they on the back of the legs, the shins?

A Yes, basically the buttocks were the most heavily bruised.

Q Do you recall any bruises on the lower legs?

A Yes.

(p. 27) Q Where were those located?

A I think there were a couple of them in the front of the legs. Again, I—I recall seeing a few just below the knee, different colors.

Q Were there any bruises on his arms?

A As I recall, he had again just some old bruises, mostly brownish type bruises on the upper arms.

Q On both arms?

A I think so.

Q Did he have any bruises on his shoulders?

A I don't recall that striking me.

Q The physical exam though indicates that he has some bruises on his face. Do you recall where the bruises were on his face?

A I don't recall. It says in the notes here that he had some in the right forehead. I don't recall. What I do recall is—and this is not in here because Dr. Kayali was

not there when we observed the scalp because he does mention here no bruise on the scalp. But when we took him to the operating room we shaved him and found a lot of bruises on the old bruises, little brown spots all over his scalp; and as a matter of fact, I think we took pictures.

Q The hospital took pictures or did the police department?

A No, we took pictures.

(p. 28) Q Would those be in the file somewhere?

A I don't know what happened to them. As a matter of fact, if I recall, I think they didn't turn out or something like that, but I know we took pictures.

Q Since they may not have turned out, can you describe for me as accurately as possible what you observed with respect to those old bruises on the scalp area?

A Well, they were on both sides of the scalp, in the front, in the back. They varied from quarters to dime size, and they were definitely old.

Q How many do you recall observing?

A I would say approximately half a dozen.

Q And those would be in the areas that would be covered by his hair normally?

A Yes.

Q The bruise that was observable on his face, I believe on the right forehead, how large was that?

A I think it was about a quarter size.

Q Were there any other bruises observable on his face, on his cheeks or his chin or any other areas like that?

A I think it was about a quarter size.

Q Were there any other bruises observable on his face, on his cheeks or his chin or any other areas like that?

A I think there was, but I really don't recall precisely.

Q And all the bruises about his head, in your opinion, they were not fresh.

A No.

Q My statement was correct. They were not fresh.

(p. 29) A They were not fresh, and I think I can prove that even further because I—I did—when you do a craniotomy you have to turn the flap, and the skin underneath and the structures underneath the skin were not discolored. That is, it was fairly old. There was no evidence any time of fresh trauma. You usually have, for instance, there's different structures called the periosteum which covers the bone in the galea, and there's no hemorrhage in those.

Q When you lifted the skin and the subcutaneous tissue that covers the skull, you observed no hemorrhage on any of that.

A Right.

Q Indicating in your own mind that any of the bruises that you saw about the head were old bruises.

A Right. And also telling me again that this fall down the stairs was not the cause of this injury.

Q In describing the color of the bruises, they use colors such as blue, brown, yellow, faint red and red. Can you tell me where the fresher bruises appeared to be on his body?

A I think the lower extremities were the most obvious. They were the ones that were red, quite red and blue.

Q As part of the examination they found that there was no blood in the ear canals. Was that significant from the (p. 30) standpoint of any of your opinions?

A Only that if there had been blood, we would have determined that there could have been a fresh injury like a fall down the stairs or something like that.

Q It says there was also no blood behind, and there's an abbreviation, TM's. What's that?

A Tympanic membranes, which are the membranes that—it's like skin over a drum. That's exactly—eardrum basically.

Q And it also says nose showed no blood, mouth was okay.

A Right.

Q Once again, is that indications that there was no fresh trauma to the head?

A Not necessarily. I mean, it certainly adds to the thing, but if—even if, he could have had fresh trauma to the head and have no blood in his mouth.

Q Next I want to discuss the operation you performed on March 8th of '84.

A Yes.

Q And I believe you have prepared, and it's in the hospital records, an operative report, and I'm going to be going—my questions are going to be based on your operative report, so you can follow along. In your operative report you note a preoperative diagnosis of acute subdural hematoma with brain contusion?

* * *

EXHIBIT I

(p. 5) Q Where?

A My freshman year I went to San Diego State College in California.

Q What did you do after your freshman year?

A I went back to—came back to Wisconsin and went to Madison.

Q Did you finish at Madison?

A Yes, I did. I got my Bachelor's Degree at Madison.

Q Was that a BS?

A BA.

Q In what, please?

A Social Work.

Q And what year did you get that?

A 1971.

Q And when you graduated with your BA Degree in '71, did you continue at that time with schooling or did you go to work?

A Yes, I did. I continued.

Q What did you do?

A I continued at Madison and got my Master's Degree.

Q Was that a BSW?

A MSW.

Q Master of Science in Social Work?

A Yes.

Q I have heard the term MSW tossed around a lot. Are those (p. 6) two different degrees?

A Basically they're the same. At Madison they give you a MSSW.

Q Okay. And when did you receive your Master's Degree?

A 1972.

Q So you just went straight through and got the Master's Degree?

A Yes.

Q And when you got your Master's Degree, what did you do then?

A I got a job.

Q Tell us about that?

A The job was Group Home Coordinator in the Foster Care Unit, Winnebago Department of Social Services in Oshkosh.

Q Group Home Coordinator?

A Yes.

Q Of the Foster Home Unit?

A In the Foster Home Unit.

Q In the Winnebago County DSS?

A Yes.

Q What does that mean?

A What does what mean?

Q That very long and fancy job title. What does that merely mean?

A I had responsibility for, at the time, four group homes,

* * *

(p. 8) A Right.

Q What did you do then?

A I got the job as Supervisor of the Child Protective Services Unit with Winnebago County of Protective Services.

Q And that's the job you're in presently?

A Yes.

Q So you took that job on somewhere around the middle of 1973?

A 1974.

Q Do you remember a month?

A May.

Q So you have been in that job essentially eleven and one-half years now?

A Yes.

Q Have there been any breaks in service, leaves of absence, things of that sort?

A No.

Q I'm not asking you about did you take vacation, but you didn't go away for six months for a sabbatical or something?

A No.

Q As Child Protection Service Supervisor, are your duties at the present time essentially what they have been throughout the time of your service in that job?

* * *

SUPREME COURT, U.S.
FILED
JUN 13 1988
JOSEPH F. SPANIOL, JR.

No. 87-154

In The

Supreme Court of the United States

October Term, 1987

JOSHUA DeSHANEY, a Minor, by his Guardian ad litem, and MELODY DeSHANEY,

Petitioners,

vs.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES; WINNEBAGO COUNTY; ANN KEMMETER and CHERYL STELSE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

Donald J. Sullivan
Counsel of Record
Law Offices of Donald J. Sullivan P.C.
1815 Evans Avenue
Cheyenne, WY 82001
(307) 634-0112

Curry First
Legal Aid Society of Milwaukee, Inc.
1204 West Wisconsin Ave.
Milwaukee, WI 53233
Attorneys for Petitioners

June, 1988

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

This case presents the following questions for review:

1. Whether a child known by the public child protection officials to be in serious danger of abuse or neglect, and whom the authorities actually undertake to protect from a specific danger, enjoys a constitutionally protected right under the Fourteenth Amendment to at least minimum standards of protection from physical abuse and neglect.

2. Whether the aggravated misconduct of public child protection officials (whether designated gross negligence, deliberate indifference, or willful and wanton misconduct) suffices to trigger the protections of the Due Process Clause.

3. Whether the deliberate refusal of child protection officials to act to protect an identified individual child already under their auspices, and actually known to them to be in extreme danger of death or profound injury from an identified and known imminent danger, can be sufficiently reckless, deliberately indifferent, grossly negligent or willful and wanton as to impose liability under 42 U.S.C. 1983.

4. Whether egregious misconduct of public officials, rising to the level of gross negligence, deliberate indifference, or willful and wanton misconduct, leading to massive personal injury to an infant citizen, is excluded from the application of the civil rights laws on the basis that the misconduct was omissive in nature.

PARTIES

All parties to this proceeding in this Court, and in the Court below, are identified in the caption. Not identified are Randy DeShaney, the abusing parent, who was a party defendant in the original Complaint, and the State of Wisconsin, which was dismissed by the trial court as a party defendant. Mr. DeShaney was until recently incarcerated by reason of the matters involved herein.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
The Course of the Proceedings Below	2
The Factual Background of the Case	3
Summary of Argument	8
Argument	11
I: An Endangered Child Has A Constitutionally Protected Due Process Right To Receive Appropriate Protection Where The Public Officials Charged With That Responsibility Have Actual Knowledge Of The Child And His Plight And Actually Undertake To Protect Him.	11
A: The Importance of a Child's Safety and the Intimate Relationship between an Endangered Child and a Child Protection Agency Which Knows of His Plight and Undertakes to Protect Him from a Specific Known Danger Establish a Constitutionally Protected Right to at Least Minimum Levels of Protection.	11
B: A Statute Mandating and Promising Child Protection Creates a Due Process Entitlement in the Child Which May Be Enforced Under Section 1983; The Provisions of the Applicable Wisconsin Child Protection Statutes Create Such an Entitlement.	24

TABLE OF CONTENTS—Continued

Page

II: The Misconduct Of The Respondents In This Case Was Far Beyond Mere Negligence And, However Designated, Was Sufficiently Aggravated To Establish Liability Under Section 1983. 29

Conclusion 34

TABLE OF AUTHORITIES

CASES:

Pages

Baker v. McCollan, 443 U.S. 137 (1979) 11

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) 18

Board of Pardons v. Allen, — U.S. —, 107 S.Ct. 2415 (1987) 24

Board of Regents v. Roth, 408 U.S. 564 (1972) 9, 17, 18, 24, 29

Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982) 17

Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972) 12

Daniels v. Williams, 474 U.S. 327 (1986) 11, 29, 30, 31, 33, 34

Davidson v. Cannon, 474 U.S. 344 (1986) 11, 29, 30, 31, 33, 34

DiMarzo v. Cahill, 575 F.2d 15 (1st Cir. 1978) 12

Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981), cert. denied 464 U.S. 864 (1983) 13, 14, 17

Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985) 3, 15, 16

Estelle v. Gamble, 429 U.S. 97 (1976) 9, 13, 29

Fox v. Custis, 712 F.2d 84 (4th Cir. 1983) 17

Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985) 12

Hewitt v. Helms, 459 U.S. 460 (1983) 24

Ingraham v. Wright, 430 U.S. 651 (1977) 12

Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984) 14, 15, 16, 18

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 23

Martinez v. California, 444 U.S. 277 (1980) 13, 14, 16

TABLE OF AUTHORITIES—Continued

	Pages
Palmore v. Sidoti, 466 U.S. 429 (1984)	23
Rochin v. California, 342 U.S. 165 (1952)	20
Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), Pet. for cert. filed 56 U.S.L.W. 3290 (10-20-87)	9, 16, 17, 24, 30
Ware v. Reed, 709 F.2d 345 (5th Cir. 1983)	12
Webb v. Hiykel, 713 F.2d 405 (8th Cir. 1983)	12
White v. Rochford, 592 F.2d 381 (7th Cir. 1979)	12, 17
Youngberg v. Romeo, 457 U.S. 307 (1982)	13

CONSTITUTIONAL AND STATUTORY AUTHORITIES:

U.S. Const. amend. VIII	13
U.S. Const. amend. XIV	1, 9, 12, 13, 16, 17
28 U.S.C. § 2101	1
42 U.S.C. § 1983	2, 9, 13, 17, 24, 29, 30, 34
Wis. Stat. Ann. Chap. 48 (West 1983)	
§ 48.01	2, 25
§ 48.981	2, 6, 20, 25

MISCELLANEOUS:

Eaton, Causation in Constitutional Torts, 67 Iowa L.Rev. 443 (1982)	12

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals in this matter is reported at 812 F.2d 298 (7th Cir. 1987), and is set forth at pages 36 - 46 of the Petition for Writ of Certiorari. The district court's opinion was not published, and it is set forth at pages 47-75 of the Petition for Writ of Certiorari.

—o—

JURISDICTION

a) The Writ of Certiorari issued upon a Petition seeking review of a judgment of the Court of Appeals for the Seventh Circuit, which was entered on February 12, 1987.

b) The Seventh Circuit entered its Order Denying Rehearing on April 21, 1987. No Order was entered extending the time for filing the Petition for Writ of Certiorari.

c) The Petition for Writ of Certiorari was filed with this Court of July 17, 1987, and the Writ issued March 21, 1988.

d) Petitioners believe this Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. 2101.

—o—

STATUTES INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It also involves 42 U.S.C. § 1983, which provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It also involves the Wisconsin Children's code, Chapter 48, and particularly § 48.01 and § 48.981 thereof. In view of their length they are set out in full in the Appendix to this Brief.

—o—

STATEMENT OF THE CASE

A) The Course of the Proceedings Below

The Complaint in this action (J.A. 2) was filed in the United States District Court for the Eastern District of Wisconsin on March 4, 1985. Defendants answered (J.A. 18) on March 29, 1985 and subsequently filed a motion to dismiss (J.A. 30) on October 23, 1985 which the court converted to a motion for summary judgment. (J.A. 86) The

court granted the motion for summary judgment on June 20, 1986. (Petition for Writ of Cert., 76)

The district court considered and rejected the rule of *Estate of Bailey by Oare v. County of York*, 768 F.2d 503 (3rd Cir. 1985) and held the relationship between the defendants and the child could not give rise to a constitutionally protected right of protection. (Petition for Writ. of Cert., 47-75)

A Notice of Appeal to the Seventh Circuit Court of Appeals was filed July 18, 1986.

The Seventh Circuit also rejected *Bailey, supra,* and held that, although the authorities "inexplicably failed to act on mounting, and eventually overwhelming, evidence that Joshua was in great peril from his father," (Petition for Writ of Cert., 44), the child had no constitutionally protected right which was violated thereby.

The Seventh Circuit's opinion affirming the district court was issued February 12, 1987. (Petition for Writ of Cert., 36-46) The Court denied rehearing and rehearing en banc on April 21, 1987. (Petition for Writ of Cert., 80)

B) The Factual Background of the Case

- Summary -

Four-year-old Joshua DeShaney became totally and permanently brain-damaged as of March 8, 1984, because of the cumulative effects of a continuing process of physical abuse commited upon him by his father and the father's paramour over a long period. Fourteen months before his injuries became irreparable the local child protection agency began the active phase of its case management of

Joshua's physical abuse and neglect situation, initially arranging for protective custody for his physical protection from abuse; the defendant officials returned him to the abusive home, on their own decision and without court action, and actively followed him at all times thereafter, dutifully recording in internal documents the child's deteriorating situation and their fears for his safety but taking no action whatever to protect the child.

- Details -

In January of 1982 the respondent Winnebago County Department of Social Services (hereinafter DSS) was notified, via the police department, that one Randy DeShaney was abusing his tiny son Joshua (the infant petitioner herein). (J.A. 152-153) The DSS had a special division, the Child Protection Unit, whose precise function was to identify and protect endangered children. (J.A. 110) (This was in response to the declared policy of Wisconsin law mandating specific efforts to protect endangered children and intervene on their behalf). (App. 1, *infra*) The DSS on this occasion interviewed the father, who denied the assertions against him, but did not see the child, despite the statute's requirements; DSS did nothing further and closed its file.

In January, 1983, Joshua was seen in a local emergency room as a victim of child abuse, and the DSS was notified. (J.A. 111, 157) At this time DSS arranged for temporary legal custody of Joshua to be taken, nominally by the hospital, while the County investigated. (J.A. 111, 157) The investigation resulted in a multidisciplinary team meeting, at which the physicians, the child psychologist, the nurses, the police officers, the DSS caseworker and DSS supervisor (individual respondents herein), and

the county's civil attorney were in attendance. (J.A. 113, 158-159) Despite major indications of abuse (J.A. 112-113, 156-160), the county civil attorney announced that he was unwilling to bring this matter to court for any level of child protection whatever, for undocumented reasons. The DSS officials filed their internal report, noting that child abuse was strongly suspected and promising that they would continue actively and closely to monitor the child. (J.A. 159-160) Most especially, these respondents promised that they would bring Joshua to the Court for protection at the first additional indication of child abuse, with respondent Kemmeter saying in her report:

> "I therefore recommend that the temporary physical custody order and any further allegations against this family be dismissed *at this time but will refer it back into Court should there be any further injuries to this child of an unexplained origin.*" (Emphasis supplied). (J.A. 159-160)

The County gave up any thought of custody of Joshua and, on its own initiative and without a hearing, handed him back to his abusing father and the father's abusing girlfriend. The County did so although it had reason to know each of them was abusive, "because of lack of ability to substantiate" abuse. (J.A. 114)

The County DSS also entered into a contract with the father whereby he was to receive certain counseling, remove the girlfriend from the home, and enroll Joshua in Head-Start (thus providing independent monitoring of the child's condition). (J.A. 113) This agreement between the County DSS and the father for Joshua's benefit was ignored as soon as it was made, yet no action was taken by DSS. (J.A. 116-117)

Over the next fourteen months Joshua was seen repeatedly in hospital emergency rooms for suspicious traumatic injuries. (J.A. 129-130, 143, 184-186) On November 30, 1983, the emergency room physician directed the ER nurses to file a written child abuse report on Joshua, which they did. (J.A. 120, 194) This report was communicated to the DSS caseworker, but nothing was done to follow up on it. (J.A. 120) DSS did not interview the family or observe the child about this formal medical report of child abuse, despite a clear statutory mandate to do both. (*See* § 48.981, App. 2, *infra*)

On another occasion a Head Start worker (still trying to get him enrolled pursuant to the agreement) found four-year-old Joshua alone at home, and telephoned DSS two separate times to inform them of his immediate jeopardy, yet no action whatever was taken. (J.A. 119, 177) The worker again telephoned a third time the following day and spoke directly to the caseworker (respondent Kemmeter), describing how she had found Joshua alone and unsupervised, with no idea where the adults were or when they might return. Still no action of any kind was taken.

Throughout this time DSS maintained an open casefile on Joshua, and assigned a Child Protection Unit worker to his case. (J.A. 106, 110-121) She (respondent Kemmeter) visited the home several times (although not in keeping with the Department's own guidelines). (J.A. 110, 116, 118) She claims to have had a close and caring relationship with Joshua: she would hold him on her lap and read to him. (J.A. 103) She repeatedly documented in her casefile her continuing belief that Joshua was in danger, that she did not believe the excuses proffered by

the adults for the frequent injuries to Joshua, and that she was extremely worried about him. She and DSS did nothing. (J.A. 108-109, 116-121, 129)

Kemmeter consistently violated the requirements of both good social work and her own agency by visiting Joshua rarely and intermittently. (J.A. 104) For the last three months of his conscious life, she even neglected to see Joshua himself on the few occasions when she did go to his home, instead in each instance accepting an excuse about his having a cold or being asleep in the middle of the day. (J.A. 131)

The caseworker herself observed what she has repeatedly described as cigarette burns on Joshu's face. (J.A. 130) As she later told the Family Court, "On November 9, 1983, the petitioner [Kemmeter] noted markings on Joshua's chin during a home visit which resembled cigarette burns," (J.A. 143) but she and DSS took no action.

On March 8, 1984, Joshua was again taken to the emergency room. (J.A. 140-143) He was found to be in a deep coma, with extensive old (but not new) bruising and discoloration over all parts of his body. (J.A. 125, 142, 197-198) Emergency brain surgery was done in an effort to save his life. The surgeon found massive pools of yellow liquid, consisting of the byproducts of old intracranial hemorrhages (that is, the old blood clots had been there long enough that the red blood had chemically decomposed, and only the yellow bilirubin element remained). (J.A. 141-142) The membrane covering the brain was stained blue, again by reason of the long-term standing and pooling of blood in the brain and the skull. Both

of these are unequivocal evidence of brain damage and physical trauma to the head over a long period of time. (J.A. 142) The traumas had been inflicted on Joshua well before their cumulative effects eventually put Joshua into a coma and rendered his condition irreversible.

Throughout the time she was handling Joshua's case, the caseworker knew that he had a natural mother (petitioner Melody DeShaney), who the mother was, and that the mother was from Cheyenne, Wyoming, where the marriage, Joshua's birth and the divorce had occurred. (J.A. 153) The caseworker had ample means of contacting the mother, but did not do so, despite clear agency and professional guidelines to do so (and thus enlist another adult to protect Joshua). When it appeared that Joshua would die imminently the caseworker did, for the first and only time, contact the mother, to tell her that Joshua was dying. (J.A. 132)

When the natural mother and grandmother arrived in Oshkosh, Winnebago County, Wisconsin, the caseworker told them, "I just knew the phone would ring some day and Joshua would be dead." (J.A. 107-108)

Joshua has lost nearly half the tissue in his brain, is permanently substantially paralyzed, and is profoundly and permanently retarded and brain damaged. (J.A. 134-135)

———o———

SUMMARY OF THE ARGUMENT

This case presents two questions: first, whether Joshua DeShaney, who was being systematically abused

and neglected by his father and the father's resident paramour, had a liberty interest which is protected by the Fourteenth Amendment, such that its violation can be actionable under the provisions of 42 U.S.C. § 1983 (and, separately, whether his noncustodial, nonabusing mother Melody DeShaney's parental rights are actionable here); and, second, if so, whether actions of the child protection authorities which are greater than negligence, but short of actual intent, can trigger liability under § 1983.

Petitioners urge, first, that a child who is known by the designated child protection authorities to be in actual danger of severe physical abuse or neglect has a constitutionally protected right to appropriate protection. In addition to the right simply to live, and the more general rights of family association, education and marriage, the child enjoys the right to be free from infliction of unnecessary pain and the right to physical safety and integrity. The urgency of the right is still clearer where, as here, the authorities actually undertake to protect and care for the particular endangered child.

Separately, where a state statute creates a duty of child protection and enunciates guidelines to assure proper protection, the child also enjoys an entitlement to that protection which is constitutionally protected under *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Extreme misconduct, however labelled, is actionable in such a setting. *See Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), *Pet. for cert. filed*, Dkt. No. 87-521, 56 U.S.L.W. 3290 (U.S. Sept. 25, 1987); *see also Estelle v. Gamble*, 429 U.S. 97 (1976). To hold otherwise would encourage child protection authorities to refuse to

act, would reward inactivity of public officials charged with important affirmative duties, and would defeat one of the primary values of this or any other free society, the safety of children.

Joshua DeShaney has been deprived of his constitutionally protected rights in circumstances where even minimally competent actions by the designated authorities would in all likelihood have sufficed to save him. Instead the authorities merely collected the mounting and eventually overwhelming evidence of the systematic abuse and neglect he was suffering. (J.A. 129-131, 143-144) They knew of and repeatedly observed personally the frequent incidents of significant suspicious injuries, including cigarette burns to his face (J.A. 118, 130, 143), lacerations to his cornea (J.A. 118) and injury to his penis (J.A. 113). They received numerous reports of abuse and neglect from other sources, including physicians and nurses (J.A. 120), a hospital (J.A. 116, 120), the police (J.A. 153), a relative (J.A. 153) and a Head Start social worker (J.A. 118, 177). They considered that his was a case of child abuse (J.A. 109-110) and requested and assigned in this one case only a teammate to help monitor Joshua. (J.A. 108) They had actual knowledge of significant medical symptoms suggestive of brain damage, and knew he was not receiving medical care. (J.A. 131) The caseworker later told witnesses she had expected that Joshua would eventually die of child abuse. (J.A. 107) Whether the respondents' refusal to act in the face of all these circumstances is labelled gross negligence, deliberate indifference, or willful and wanton misconduct is of no moment; under any rubric it far exceeds our notions of ordinary negligence, and hence

passes the bar of *Daniels v. Williams*, 474 U.S. 327 (1986) and *Davidson v. Cannon*, 474 U.S. 344 (1986).

This child enjoyed important fundamental rights, including the right to be protected by the state, or the right at least to receive protective services in a manner other than gross negligence or deliberate indifference. His rights were seriously violated over a protracted period of time and he remains brain damaged for life as a result. He has stated a proper cause of action and should be permitted to go forward with his proof.

———o———

ARGUMENT

I: An Endangered Child Has A Constitutionally Protected Due Process Right To Receive Appropriate Protection Where The Public Officials Charged With That Responsibility Have Actual Knowledge Of The Child And His Plight And Actually Undertake To Protect Him.

A: The Importance of a Child's Safety and the Intimate Relationship between an Endangered Child and a Child Protection Agency Which Knows of His Plight and Undertakes to Protect Him from a Specific Known Danger Establish a Constitutionally Protected Right to at Least Minimum Levels of Protection.

The first point of inquiry is the existence of a protected right which may be alleged to have been violated or deprived. *Baker v. McCollan*, 443 U.S. 137 (1979).

One must distinguish at the outset between the presence of a protected civil right and the subsequent require-

ment of causation and foreseeability of harm in the context of causation.[1] Where such duty exists, the federal courts have consistently recognized § 1983 liability for refusal to act, as for example when police officers neglect their duty to enforce the laws. *See, e.g., Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972); *see also Fundiller v. City of Cooper City*, 777 F.2d 1436, 1441-1442 (11th Cir. 1985); *Ware v. Reed*, 709 F.2d 345, 353 (5th Cir. 1983); *Webb v. Hiykel*, 713 F.2d 405, 408 (8th Cir. 1983). Similarly the First Circuit, in *DiMarzo v. Cahill*, 575 F.2d 15 (1st Cir. 1978) found § 1983 liability where an official's failure to carry out state law duties resulted in prison conditions below the minimum standard of the Fourteenth Amendment (and not just violation of state law minimum standards). *See also White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (police officers had a duty to protect minor children from immediate hazards after they arrested the children's guardian).

In analyzing Fourteenth Amendment violations, the courts have relied on a two-stage analysis. The first element is whether the individual's interests are encompassed within the Fourteenth Amendment's protection of life, liberty and property. If so, the court must then decide what procedures constitute "due process of law." *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

As a broad proposition there is no generalized duty on a state or municipality to provide affirmative protection

---

[1]*See* Eaton, *Causation in Constitutional Torts*, 67 Iowa L. Rev. 443, 479 (1982): "Resolving the threshold question of duty in terms of causation can only confuse both issues. Greater clarity and precision would be achieved if courts would recognize the distinction between duty and causation and analyze each in its own terms."

to members of the public at large. *Martinez v. California*, 444 U.S. 277 (1980). Such duty, and the individual's corresponding right, may arise out of the relationship created or undertaken by the state with respect to certain parties.

This Court recognized an affirmative duty to provide protection in the Eighth Amendment context in *Estelle v. Gamble*, 429 U.S. 97 (1976). It has subsequently bridged the gap between the Eighth Amendment setting and the broader Fourteenth Amendment context. For example, in *Youngberg v. Romeo*, 457 U.S. 307 (1982) the Court recognized a right to affirmative care and found a Fourteenth Amendment liberty substantive due process interest in a mental health setting, saying the "right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Id.* at 315.[2]

Every Circuit Court which has considered this issue, with the sole exception of this present case, has in a variety of child-concern contexts affirmed the need and the right of the child to special consideration from the state.

Considering specifically the context of child protection, the Second Circuit held that the Fourteenth Amendment creates, and guarantees the child's right to, an affirmative duty of protection in *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2nd Cir. 1981),

---

[2]Two years earlier, in *Martinez v. California, supra*, the Court held that the causal connection between the State's actions and those of its parolee were too attenuated to impose liability (despite the fact that he was still in legal custody), but the Court held open the possibility that in another setting the Fourteenth Amendment right could be used in a § 1983 action. 444 U.S. at 285.

cert. denied, 464 U.S. 864 (1983). In *Doe* the Commissioner of Welfare, as legal custodian, arranged for foster placement and contracted for another agency to supervise the home and make periodic reports. The Court held that, by failing to protect an individual who was either in its custody or under its care, the state violated a constitutionally protected liberty interest. *Id.* at 141. The *Doe* court made clear that legal custody was not essential to the existence of the constitutionally protected right to appropriate protection.

In *Jensen v. Conrad,* 747 F.2d 185, 194 (4th Cir. 1984) the Fourth Circuit said on facts highly similar to but less pressing than those in this case that "a right to affirmative protection need not be limited by a determination that there was a 'custodial relationship.'" The *Jensen* court found that liability was uniquely avoided on the facts of the case, and restricted the holding to the particular facts of that individual setting, saying: "Were the issue properly before the court on different facts, there would be nothing to preclude further definition of the meaning of that term followed by a ruling that the facts of that case fell within the meaning of 'special relationship.'" *Id.* at 194-195.

The *Jensen* court left open the contours of the "special relationship" notion and mentioned several factors it felt should be included in any such analysis. These were (a) whether either the victim or the perpetrator was in legal custody at the time of the incident, or had been in legal custody prior to the incident; (b) whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and (c) whether the state knew of the victim's plight. *Id.* at 194-195 n. 11.

The first of these suggested criteria is aimed at whether the defendants had reason to be aware that the particular victim, as opposed to the world at large, faced a special danger or that a particular individual created a special risk of harm. The second looks to the desire of the state affirmatively to locate and protect children at risk for abuse or neglect. The third looks to the extent of the state's proclaimed intent to offer affirmative protection. The *Jensen* court noted that knowledge of the children's plight strengthened the argument that a special relationship existed and that a correlative duty to protect had been established.

The Third Circuit considered the same question in *Estate of Bailey by Oare v. County of York,* 768 F.2d 503 (3d Cir. 1985), and employed the *Jensen* court's suggested criteria. *Id.* at 509. There, as here, a small child lived with a natural parent and the parent's paramour. There, as here, there was an accusation of the paramour's having struck the child, and an initial hospitalization and examination. There, as here, the examing medical staff felt they were dealing with an abuse situation and so advised the child protection agency. There, as here, the recommendation was made that the paramour be kept away from the child. There, as here, the welfare agency initially arranged for placement away from the home, and then returned the child to the home. There, the agency did not investigate or know where the paramour was or what the home conditions were, whereas here that information was at hand and was adverse to the child's interests and to the agency's own recommendations. There, the child died within a month, whereas here the child continued to be abused systematically while the DSS continued to annotate the

observed signs of abuse and neglect for almost a year and a half.

The Third Circuit noted that not only did the agency have notice of the child abuse, but that it was aware that the individual child "as distinguished from the public at large, faced a special danger." *Id.* at 510, citing *Martinez*, 444 U.S. at 285. "When the agency knows that a child has been beaten, [t]his strengthens the argument that some sort of special relationship has been established." *Bailey, supra,* at 510-511, citing *Jensen*, 747 F.2d at 195 n. 11. In this setting the court held that the agency had an affirmative duty to protect the child.

The Eleventh Circuit considered these same issues in *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc). Viewing the question of constitutional protection of a child's rights in accord with the Second, Third and Fourth Circuits, the court held that those rights exist and would be violated by gross neglect or deliberate indifference of a child protection agency, and further held that the state's statutory scheme created a right to protection that could not be denied without due process.

Analyzing the liberty interests of an endangered child for Fourteenth Amendment purposes, the court said: "The liberty interests in this case are the right to be free from the infliction of unnecessary pain, as that interest is protected by the fifth and fourteenth amendments, and the fundamental right to physical safety as protected by the fourteenth amendment." *Id.* at 794 (footnote omitted).

It went on to say that it was the state's "action in assuming the responsibility of finding and keeping the child in a safe environment [which] placed an obligation

on the state to insure the continuing safety of that environment." *Id.* at 795.

The court was careful to enunciate that it is not a formal legal relationship which gives rise to the right to protection and safety. Referring to *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982), the court pointedly noted that the "*Bowers* court refused to distinguish between custodial relationships and 'other relationships created by the state.'" *Id.* at 798. It also cited the Fourth Circuit in *Fox v. Custis*, 712 F.2d 84 (4th Cir. 1983), to make clear that a right to protection may arise "out of special custodial *or other relationships* created *or assumed* by the state in respect of particular persons." *Id.* at 798 (emphasis supplied).[3] The court held that the relationship between a child protection agency and the endangered child was so significant in the child's life as to establish a due process right which is actionable when violated by deliberate indifference.

The *Ledbetter* court separately reviewed the child's claim that state law and action in child protection had created an entitlement protected by the Fourteenth Amendment and enforceable under § 1983, under the approach used by this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Reviewing in detail the Georgia child protection statutes, the court discerned a demonstrated intention to bestow benefits to endangered children, and further noted

---

[3]Note that *Doe, supra,* also speaks of either custody or care, and also that the Seventh Circuit used the same language in *White v. Rochford, supra.*

the statutes set out specific guidelines and criteria to further that intent, and found that a *Roth*-type right had been created.

Going to the heart of the matter, the court said:

> "It is of no moment that the state officials are not charged in this case with affirmatively acting to harm this child. What the child is entitled to is the state's protection from harm. She is entitled to be protected in the manner provided by statute. It would be anomalous if the state, in allegedly acting to protect the child, could itself cause harm to the child by failing to assume the child's minimal physical safety. Failing to act may, under certain circumstances, be more detrimental than acting." *Id.* at 800.

The decisions of all of the Circuit Courts which have considered this matter, then, outside of the present case, recognize that the endangered child does have a constitutionally protected right to receive appropriate protection from the designated child protection authorities.

The viability of the noncustodial mother's rights are dependent, of course, on the viability of the child's claim. Where the child enjoys a constitutionally protected right in this situation, which is then violated by aggravated official misconduct, her constitutionally protected right to the enjoyment of a relationship with her son is effectively violated by that action. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1242-1248 (7th Cir. 1984).

Looking to the criteria the Fourth Circuit suggested in *Jensen*, for example, and to the purposes behind them, it is clear that each of them is applicable to Joshua's case. The respondents knew who Joshua was, and that he was at risk for child abuse (J.A. 108-109, 116-120, 129, 153),

and even arranged for temporary custody at one point. (J.A. 111) The DSS knew that the paramour was a probable abuser of Joshua, since the first medically-reported abuse complaint involved a time when she alone was with the child (J.A. 129), and since at that time the father informed DSS directly that he felt she had abused Joshua. (J.A. 113) Further, the first report DSS ever had about Joshua, from the father's previous wife via the police department, noted that Joshua "is a prime case for child abuse," referring in that instance to the father himself as the abuser. (J.A. 153)

Second, the state and the county had expressed specific policies and intentions to seek out and prevent child abuse. (*See* discussion of Chapter 48, Wisconsin Statutes and the policies of the County and its DSS under that Chapter, *infra*).

As to the third element, the County and its DSS knew Joshua intimately, they made detailed note of every emergency room visit, they personally observed repeated suspicious traumas to the child (injuries to the penis, cigarette burns to the face, a scratched cornea, inexplicable lesions, etc.). (J.A. 110-121, 129-131) The caseworker was so suspicious of child abuse that, for the one and only time in her long career, she obtained a teammate to help her with Joshua (J.A. 108-109), and told the teammate she felt Joshua was being abused (J.A. 109); the teammate viewed it as an abuse case. (J.A. 110) The caseworker subjectively believed, and later admitted she had believed, that Joshua would someday die of child abuse. (J.A. 107)

The County had effectively ignored the first report of child abuse (J.A. 153), and at the second report arranged for temporary custody of the child pending an investiga-

tion. (J.A. 111) That effort resulted in a reluctant return of the child to the dangerous home with the written promise to take immediate formal action upon the occurrence of any additional suspicious trauma. (J.A. 159-160) It also resulted in a written contract with the father for the child's protection. (J.A. 113) The promise and the contract were both ignored, forgotten as soon as they were written, and repeated injuries, warnings, child abuse reports and neglect reports were received and ignored by the DSS. The County and its DSS affirmatively took on the care of Joshua, and at least once his custody as well, and unilaterally returned him to the abusive home with nothing more than a token promise they never tried to keep. The respondents continued their efforts for Joshua's ostensible "care and protection" for more than another year, so that by the time he was permanently brain damaged they had collected a massive file of information to utilize in the eventual (and inevitable) criminal prosecution. But their responsibility for Joshua's care had been profoundly neglected to such a conscience-shocking extent that it violates the most basic precepts of this society and constitutes a substantive due process deprivation within the meaning of *Rochin v. California*, 342 U.S. 165 (1952).

On these facts, and under the reasoning described, the conclusion must follow that Joshua had a right, a liberty interest in being protected from foreseeable, and actually-seen, child abuse.

The DSS and its caseworker neglected Joshua in another important respect as well. The Wisconsin statute defining "neglected child" [Chap. 48, Section 48.981(1)(d)] provides: "'Neglected child' means a child whose

parent, guardian, legal custodian or other person exercising temporary or permanent control over the child neglects, refuses or is unable for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child." The caseworker documented in the casefile that the father and the girlfriend told her, while she was in the home on March 7, 1984, that Joshua had been fainting, had been falling down, and had lost consciousness, and complained of headaches, and that he had struck his head on a toilet. (J.A. 130-131, 179) They also told her that the child had received no medical care although the condition had already persisted for some time, and that they had no plans to seek medical care for him (but that they would do so if it "kept up"). (J.A. 131, 179) Despite the plain need to have the child seen by a physician, and the fact that this same "head striking the toilet" excuse had been offered by the adults (J.A. 120) subsequent to the uninvestigated November 30, 1983 hospital report to DSS of suspected child abuse (which excuse DSS had also accepted without inquiry on that occasion even though the caseworker was skeptical) (J.A. 120), no action was taken. This is very serious medical neglect, both in terms of common experience and in terms of the Wisconsin neglect statute, *supra*: the child was plainly being deprived of needed medical care, and the caseworker knew it, yet did nothing. The caseworker neglected even the rudimentary step of seeing the child, although he was in the next room. (J.A. 131)

This is especially significant in light of the medical and surgical findings the very next day. Joshua's head

was marked with a number of old bruises, mostly brown or dark brown in color, indicating they had been present a substantial length of time; yet no new, fresh bruises were seen. In surgery his skull was found to be intact and without fractures, but his meninges were seen to be stained blue, indicating that there had previously been blood there for a long period, yet no new, fresh blood was seen. When his brain was surgically opened, the physicians found quantities of yellow matter consisting of old blood which had chemically decomposed, indicating that it had been present a long time, yet no fresh bleeding was seen. As the physicians noted, the damage to Joshua's brain was caused by a protracted series of traumatic events over a long period of time, creating long-standing bleeding within the brain. (J.A. 125, 141-142) It is clear that the losses of consciousness the last several weeks of his "normal" life, the falling down, the complaining of blurring vision and headaches, related to the increasing pressure within his brain of the accumulating pockets of blood which were gathering.

Even as late as the March 7 visit of the caseworker, timely medical intervention could, and likely would, have prevented the permanent brain damage which ensued once his brain finally gave out. Merely securing a visit to a doctor could have saved this child, and the caseworker had actual notice of compelling reason to insist that be done, or to do it herself.

It should also be noted that children are constitutionally entitled to protections which may not be available to adults. Speaking in another setting, former Chief Justice Burger wrote:

> "The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. . . . The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause." *Palmore v. Sidoti*, 466 U.S. 429, at 433 (1984).

This dictum reflects fairly the recognition of our society that children are, after all, inherently different and therefore needful of appropriately different constitutional protections. Where, as in the passage above, the high duty of the state to protect children is considered sufficient for Equal Protection purposes, it must necessarily be sufficient for the broader application of the Due Process Clause. Process can hardly be both due and unequal.

Petitioners would also urge in this regard that Joshua had a protected liberty interest in his equal access to the services which the state and county undertook to provide for all endangered children, on a basis which did not arbitrarily single him out for grossly negligent and deliberately indifferent "protection." *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The state or county may have been free originally to refrain from providing any child protective services, but having proclaimed a formal statutory policy of providing such services and having actually engaged for years in providing them, and having provided them adequately to many other children (and perhaps provided them carelessly or negligently to others), they may not single Joshua out arbitrarily by refusing to provide him appropriate protection and by treating him, unlike all the other children, in a grossly negligent, de-

liberately indifferent or willful and wanton manner. To single him out for egregious mistreatment is to deprive him without due process of a right to which he was entitled. *Taylor v. Ledbetter, supra.* As Justice Stevens noted in his dissent in *Hewitt v. Helms*, 459 U.S. 460 (1983), where public officials treat one individual differently from all others, absent some overriding justification, the protections of the due process clause will be implicated. *Id.* at 485 (dissenting opinion).[4]

B: A Statute Mandating and Promising Child Protection Creates a Due Process Entitlement in the Child Which May Be Enforced Under Section 1983; The Provisions of the Applicable Wisconsin Child Protection Statutes Create Such an Entitlement.

This Court confirmed in *Board of Regents v. Roth*, 408 U.S. 564 (1972), discussed *supra*, that in appropriate circumstances a state statute may create a benefit which amounts to an entitlement and which enjoys due process protection. *Taylor v. Ledbetter, supra.* In *Board of Pardons v. Allen*, 107 S.Ct. 2415 (1987) Justice O'Connor in dissent reviewed this concept and noted that, to give rise to a constitutionally protected right, the statute in question must create an entitlement, not a mere expectancy, and

---

[4]The requirement is that all members within the particular protected class (e.g., children) be treated evenly, at least so that one is not treated exceptionally worse than the others; it is not that separate classes (e.g., children and prisoners) must be treated alike in all respects. There are certainly good reasons for treating prisoners differently than small children. It is fruitful to contemplate, in this regard, the painful regularity with which child abuse victims grow up to lives of crime and violence, and the power of society's interest in protecting itself from future crime by caring for endangered children today.

suggested that "the statute must act to limit meaningfully the discretion of the decisionmakers." 107 S.Ct. at 2423.

The Wisconsin child protection statutes (Chapter 48, Wis. Stats., commonly referred to as "The Children's Code") are clear and specific in their intent affirmatively to recognize and protect children who are endangered by abuse or neglect. Sec. 48.01 details at length the state's desires for the benefit and protection of children. In view of their length, § 48.01 ("Title and legislative purpose") and § 48.981 ("Abused or neglected children") are submitted in the Appendix to this brief.

The Children's Code defines the relevant terms, including "abuse" and "neglected child." § 48.981(1). It provides in considerable detail for reporting of suspected abuse and neglect, and creates an absolute duty of mandatory reporting imposed on a variety of persons, particularly police, educators, health care professionals and social workers. Sec. 48.981(2) provides that a designated professional who has "reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected *shall* report as provided in sub. (3)." (emphasis supplied). The duty to report, and the duty to act on the report of a designated professional encompasses not only respondents Kemmeter and Stelse (J.A. 164-166) but also the Head Start social worker who telephoned to DSS reports of her observations of neglect of Joshua three times over two days, without response. (J.A. 118, 177)

The mandatory duties of the county department of health and social services (DSS) are set forth in § 48.981

(3)(c). These nondiscretionary obligations include initiating an investigation within twenty-four hours after any report or indication of abuse or neglect is received, and performing the investigation thoroughly. It must be conducted in accord with standards previously set up by the department for child abuse and neglect investigations, and must, if possible, include seeing or talking with the child. The county department is obligated to keep a record of all its actions in connection with each report received, with specified mandatory information. The DSS is required to update the record every six months until the case is closed. The DSS is required to report separately to the individual who made the initial report of suspected abuse of its actions, and must do so within sixty days. It is required to coordinate the furnishing of services to abused and neglected children and their families. The DSS is required to provide relevant data to the state DSS on every investigation it conducts. Importantly, the DSS is mandated to make a determination, within sixty days of receiving a report of abuse or neglect, as to whether abuse or neglect has occurred or is likely to occur. Respondents' own expert confirmed that this means, both formally and in practice, that each time new information suggestive of abuse or neglect is obtained, from outsiders or from the caseworker's own observations, a new formal investigation is mandated by the statute. He confirmed, also, that the new or continuing observations of the caseworker herself trigger a new duty, each time new indicia of abuse or neglect are noted, to report and to initiate new formal investigations. (J.A. 164-166)

This statutory scheme effects at least one other significant result. Every person described is obligated to

report suspected abuse and neglect, either to the DSS directly or to the police (who are in turn then obligated to refer the matter promptly to the DSS). Only the DSS is authorized (or required) to investigate the suspicion of abuse or neglect, and only the DSS is empowered to do anything about it, including bringing the matter to court for hearing and determination. Every other person outside DSS, although obligated to report to DSS, is utterly disabled from acting on behalf of the endangered child. Everything must go to DSS, and only DSS is authorized to act. Thus all the natural allies of an endangered child—a doctor or nurse, a police officer, a teacher, a relative, a neighbor—who might ordinarily be expected to intervene to help an endangered child are, under this statute, handcuffed. They (and the child) must hope that DSS does its job properly, at the risk of the child's life and health. This preemption by the DSS under the Children's Code significantly impacts, adversely, the natural ability of a child, or more accurately the ability of those around him, to protect him. Preemption is an important additional factor to be considered in calculating the special relationship between this actually-known endangered child and the DSS which not only promised to protect him but stripped him of the other persons who could, absent this scheme, have intervened on his behalf.

Under this statute the discretion of the authorities of the DSS is severely restricted. The response to a report, the short time for starting the investigation, the requirements for reporting to the state and to the person who originally reported the concern, and the rest of the mandates leave little if any room for doing anything other than carrying out the terms of the statute. It should be

noted, too, that there is absolutely no discretion about the duty to make full-fledged new investigations each time new indicia of abuse or neglect arise and no question that was not done here.

Thus, on the particular facts of this case, the respondents may not be heard to argue that they indeed have abundant discretion under the statute, since any room for judgment under the statute arises only later, after the prompt and thorough investigations have been carried out and it is time to evaluate the fruits of the new investigations. Here, the first report received was treated summarily (J.A. 153), the second resulted in a written contract for the child's benefit which was violated immediately (J.A. 113), and every subsequent report (from hospitals, nurses, Head Start personnel, and direct caseworker observation) generated no new investigation whatever (despite the mandate of the statute; despite the caseworker's promise in her original written report to the file to take the child directly into court upon finding any new evidence of abuse or neglect (J.A. 159-160, 116-121, 143-144); and despite her own fear and belief that Joshua was likely to die in that home). (J.A. 107-109) In every instance but one the mandatory investigation was simply omitted. The mandatory coordination with the police was not done (else, DSS would have received the police reports on their experience of the violence in the DeShaney home). (J.A. 144-145)

The respondents did not perform the functions and duties which were mandated under the statute and about which they had no choice. They may not properly argue that, having omitted the nondiscretionary essential first

steps, they then exercised some professional judgment or discretion on the basis of the very information they were required, but had failed, to obtain. (J.A. 144-145)

Petitioners urge that the scheme of the Children's Code is sufficiently extensive and detailed, and impacts heavily enough upon an endangered child (especially by taking away his natural allies and subjecting him exclusively to the actions of DSS) that it more than meets the test of *Board of Regents v. Roth, supra,* and that it creates an entitlement which the authorities may not take away without due process of law. In view of the facts of this case it is clear that the defendants violated not only their mandatory statutory duties but also Joshua's due process rights arising under the statutory scheme.

II: The Misconduct Of The Respondents In This Case Was Far Beyond Mere Negligence And, However Designated, Was Sufficiently Aggravated To Establish Liability Under Section 1983.

Daniels v. Williams, 474 U.S. 327 (1986) and *Davidson v. Cannon,* 474 U.S. 344 (1986), *supra,* left for later decision the question of § 1983 liability for conduct greater than negligence but short of actual intent to achieve harm. In this case the Seventh Circuit acknowledged that the Child Protection Agency's "inexplicable failure to act" was sufficiently excessive on the facts to pass the barrier created by *Daniels* and *Davidson,* and felt no need to decide whether to label the wrongful conduct as gross negligence, or willful and wanton misconduct, or deliberate indifference.

Petitioners believe that government conduct rising to such a level does trigger Sec. 1983 liability, under *Estelle*

v. Gamble, 429 U.S. 97 (1976), and *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir., 1987), both discussed *supra*.

Sound constitutional analysis supports this result. First, the rationale for excluding ordinary negligence situations does not apply in the exacerbated cases. *Daniels* and *Davidson* demarked the line between errors in judgment exercised within the scope of conduct fairly to be anticipated, on the one hand, and abuse of the power of the office itself. The positive effect of *Daniels* and *Davidson* was to exclude from federal civil rights litigation under § 1983 the host of routine situations which amount, at most, to questions of the exercise of normal judgment during the course of government activity. In those cases the power may not have been used well, or skillfully, or efficiently or economically or wisely, but it cannot be said to have been abused. At the same time and for the same reason, *Daniels* and *Davidson* did not alter the application of § 1983 to governmental action depriving a citizen of a protected right where the action was taken intentionally.

The distinction between the two classes under *Daniels* and *Davidson* may be seen as the distinction between abuse of power (which is actionable) and mere misuse of power (which, under these cases, is not actionable). The difference underlying the distinction is the notion of the abuse of power, the sense of offensiveness of the governmental conduct in the context of a society of ordered liberty.

The question amounts to this: shall we consider extreme misconduct (whether we apply the rubric of "gross negligence", or "deliberate indifference", or "willful and wanton misconduct") to be a mere inadvertence which can

and should be considered a normal part of the exercise of government power by fallible human beings (which is the philosophical underpinning of *Daniels* and *Davidson*), or shall we see it as the twisting and defiling of governmental power entrusted to those same persons?

When we entrust the power of government to individuals, as any structured society must, we recognize in advance that, being human, they will make some mistakes. It seems fair not to impose constitutional liability on them for mere mistakes. In the act of entrusting, however, there is no comparable assumption that those same human beings will act with extreme misconduct (however stylized). When the errors are not mere errors, but rather extreme misconduct outside the normal range of innocent fallibility, then it is abuse of the entrusted power.

A further reason for holding extreme misconduct actionable is the practical effect of the alternative. Were the Court to hold that a refusal to act, regardless of how extreme the circumstances, or how wrongful the society views the refusal under the circumstances, could not be actionable, then the lesson taken by some public officials would be to play safe, to do nothing, always to refuse to get involved, secure in the knowledge that by refusing to act they avoid any question of being sued. In a society which holds strongly-cherished beliefs about children, and in which inactivity by some public servants is considered a problem already, for the Court to add this incentive toward spectatorship would be inappropriate.

The Court below expressed concern that child protection officials could be placed in the untenable position of being subject to liability for whichever of two competing

courses they took. This concern is misplaced for several reasons.

First, it should be noted that the Circuit Court's opinion grasped firmly onto only one, and the most extreme, option available to the DSS, termination of parental rights. It ignored the availability of a host of lesser courses of action which would have been appropriate, at least pending determination of the extent of the ongoing abuse, and which would have been effective for the protection of the child they knew to be endangered. They could have taken him to a physician for a medical exam. § 48.20(4). They could have sought a court order making the family's participation mandatory. They could have sought foster home placement. They could have enforced the contract they entered into with the father for the child's protection (and which they later renewed). They could have required the child to be enrolled in Head Start, as they had contracted and as they had determined to be necessary at the first team meeting. They could have notified the child's mother (as they promptly did, finally, when he was near death). They could have done a lot of things, far short of the major step of termination of parental rights.

Moreover, what is at issue here is the smallest cognizable fraction of all official conduct. If we assume for discussion that the greatest part of child protection in this nation is performed competently and a smaller part is performed with less diligence, perhaps extending down into what may be labelled negligence, we may safely infer still that at least 99% or more of all such activity (both that done well and that done poorly) is protected from interference by federal litigation, the former because it is not harmful and the latter because, even if harmful, it

is mere negligence and thus protected under *Daniels* and *Davidson*. Whatever the actual proportion between the two groups (good work and poor or negligent work), both together constitute the anticipated (if not always the hoped-for) range of performance of entrusted governmental power, and both are free from burden in the form of § 1983 litigation.

It is only the tiny fragment, the one percent or the one-tenth of one percent, of all such activity which is at issue here. Only conduct totally beyond negligence, and rising into the vaulted heights of extreme misconduct (whether labeled gross negligence, deliberate indifference, or willful and wanton misconduct) is to be held actionable.

Indeed, this is the way even Petitioners want it to be; we are not seeking to alter *Daniels* and *Davidson*, or make every decision by a public servant into a cause of action for the unhappy loser. We only want to take the most extreme situations, those utterly beyond the Pale, which involve the abuse of the position and power entrusted, rather than merely a mistake in judgment or a difference in opinion or approach, and afford them the relief to which they are entitled.

The Seventh Circuit's opinion suggested that, if the courts find liability even on the extreme facts of this case, the officials entrusted with child protection responsibilities would be placed "on the razor's edge," arguing that they would be subjected to alternative liability for either failing to remove a child from a home or for removing a child from a home.

Petitioners believe, instead, that what the Seventh Circuit described as a razor is really more like a huge

level field containing, off in a remote corner, one small hole. In reality, child protection workers and other public officials are already amply protected by the very rule of *Daniels* and *Davidson*. Whether their actions are skillful, or mundane, or poor, or even negligent, they are utterly protected from § 1983 liability by *Daniels* and *Davidson*. Under even the strongest view of the approach which Petitioners urge this Court to adopt, officials face potential liability only in the (hopefully) rare and unusual case where their actions are outside any acceptable bounds, where they violate not merely professional standards of judgment but where their deliberate refusal to act, in a sphere specifically entrusted to them, is so profound that it violates the community's sense of outrage and would be generally perceived as fundamentally wrong or unfair.

CONCLUSION

The decision of the Seventh Circuit and the trial court that Petitioners failed to state a claim on which relief could be granted in a § 1983 action should be reversed, and the case remanded to the district court for trial upon the merits of the case.

Respectfully submitted,

DONALD JAMES SULLIVAN, ESQ.
Counsel of Record
1815 Evans Avenue
Cheyenne, WY 82001

CURRY FIRST, ESQ.
Legal Aid Society of Milwaukee, Inc.
1204 W. Wisconsin Ave.
Milwaukee, WI 53233

Attorneys for Petitioners

APPENDIX

SUBCHAPTER I

GENERAL PROVISIONS

48.01 *Title and legislative purpose.* (1) This chapter may be cited as "The Children's Code". This chapter shall be interpreted to effectuate the following express legislative purposes:

(a) To provide judicial and other procedures through which children and all other interested parties are assured fair hearings and their constitutional and other legal rights are recognized and enforced, while protecting the public safety.

(b) To provide for the care, protection and wholesome mental and physical development of children, preserving the unity of the family whenever possible.

(c) Consistent with the protection of the public interest, to remove from children committing delinquent acts the consequences of criminal behavior and to substitute therefore a program of supervision, care and rehabilitation.

(d) To divert children from the juvenile justice system to the extent this is consistent with protection of children and the public safety.

(e) To respond to children's needs for care and treatment through community-based programs and to keep children in their homes whenever possible.

(f) To assure that children pending adoptive homes will be placed in the best homes available and protected from adoption by persons unfit to have responsibility for raising children.

(g) To provide children in the state with permanent and stable family relationships. The courts and agencies responsible for child welfare should assist parents in changing any circumstances in the home which might harm the child or which may require the child to be placed outside the home.

(2) This chapter shall be liberally construed to effect the objectives contained in this section. The best interests of the child shall always be of paramount consideration, but the court shall also consider the interest of the parents or guardian of the child, the interest of the person or persons with whom the child has been placed for adoption and the interests of the public.

48.981 *Abused or neglected children.* (1) DEFINITIONS. In this section:

(a) "Abuse" means any physical injury inflicted on a child by other than accidental means, or sexual intercourse or sexual contact under s. 940.225. In this paragraph, "physical injury" includes but is not limited to severe bruising, lacerations, fractured bones, burns, internal injuries or any injury constituting great bodily harm under s. 939.22 (14).

(b) "Child" means any person under 18 years of age.

(c) "County agency" means the county child welfare agency as defined in s. 48.56 (1).

(d) "Neglected child" means a child whose parent, guardian, legal custodian or other person exercising temporary or permanent control over the child neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care

or shelter so as to seriously endanger the physical health of the child.

(2) PERSONS REQUIRED TO REPORT CASES OF SUSPECTED CHILD ABUSE OR NEGLECT. A physician, coroner, medical examiner, nurse, dentist, chiropractor, optometrist, or any other medical or mental health professional, social or public assistance worker, school teacher, administrator or counselor, child care worker in any day care center or child caring institution or police or law enforcement officer having reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected shall report as provided in sub. (3). Any other person having reason to believe that a child has been abused or neglected may make such a report. No person making a report under this subsection may be discharged from employment for so doing.

(3) PROCEDURES. (a) *Initial report.* Persons required to report under sub. (2) shall immediately contact, by telephone or personally, the county agency, sheriff or city police department and shall inform the agency or department of the facts and circumstances contributing to a suspicion of child abuse or neglect. The sheriff or police department shall within 24 hours, exclusive of Saturdays, Sundays or legal holidays, refer to the county agency all cases reported to it. The county agency may require that a subsequent report be made in writing.

(b) *Duties of local law enforcement agencies.*

1. Any person reporting suspected abuse or neglect of a child may request an immediate investigation by the sheriff or police department if the person has reason to believe that the child's health or safety is in immediate

danger. Upon receiving such a request, the sheriff or police department shall immediately investigate to determine if there is reason to believe that the child's health or safety is in immediate danger and take any necessary action to protect the child.

2. If the investigating officer has reason under s. 48.19 (1) (c) or (d) 5 to take a child into custody, the investigating officer shall place the child in protective custody and deliver the child to the intake worker under s. 48.20.

3. If the police or other law enforcement officials determine that criminal action is necessary, they shall refer the case to the district attorney for criminal prosecution.

(c) *Duties of county agencies.* 1. The county agency shall act in accordance with s. 48.57. Within 24 hours of the receipt of an initial report of suspected child abuse or neglect, the county agency shall commence an appropriate and thorough investigation to determine whether the report is "indicated" or "unfounded". The complete investigation shall, if possible, include a visit to the child's home or usual place of abode, observation of the child and an interview with the child and the child's parents or custodians.

2. Additionally, within 72 hours after receipt of an initial report the county agency shall complete and forward to the department under sub. (7) a preliminary investigative report containing the name, address, age and sex of each child involved and the type of abuse or neglect suspected. The preliminary report shall not contain any information which identifies any person other than the child.

3. An investigative report shall be classified as "indicated" or "unfounded". A finding of "indicated" for child abuse reports shall be supported by a preponderance of the evidence available to the agency; a finding of "indicated" for neglect reports shall be supported by a clear and convincing preponderance of the evidence available to the agency. Whenever there is less than the required standard of evidence indicating child abuse or neglect, the report shall be classified as "unfounded". The county agency director or his or her designee shall review and approve the investigative report prior to transmitting the report to the central registry. The person reviewing and approving the report shall not have participated in investigating the suspected abuse or neglect. A report shall not be classified "indicated" solely because the child's parent, or another person exercising temporary or permanent control over the child's care, in good faith selects and depends upon spiritual means or prayer for treatment or cure of disease or for remedial care of the child. This subdivision does not preclude a court from ordering that medical services be provided for the child, if the child's health requires it. Reports classified as "indicated" shall include a description of the services being provided to the child and those responsible for his or her care, as well as all relevant dispositional information, and shall be updated at 6-month intervals. The agency shall make findings as required under this subdivision no later than 60 days after receipt of an initial report, and shall immediately transmit the investigative report to the central registry under sub. (8).

4. After transmitting its investigative report to the central registry, the agency shall destroy its reports con-

cerning cases of child abuse or neglect classified as "unfounded".

5. If the person investigating on behalf of the county agency has grounds to take the child into custody under s. 48.08(2) or 48.19(1)(c), the person shall place the child in protective custody and shall deliver the child to the intake worker under s. 48.20.

6. The county agency shall take necessary steps to protect other children in the home.

7. The investigator shall inform any person required to report suspected cases of child abuse or neglect that the report was unfounded or that steps were taken to protect the health and welfare of a child who is the subject of a report made by the person. At least one contact shall be made under this subdivision within 60 days after receipt of the initial report by the agency.

8. The county agency shall cooperate with law enforcement officials, courts of competent jurisdiction and other human service agencies to prevent, identify and treat child abuse and neglect. To the extent possible, the county agency shall coordinate the development and provision of services to children found to be abused or neglected under this section.

9. The county agency shall forward a copy of its investigative report of alleged child abuse or neglect alleging that a child's safety is endangered, classified as "indicated" or "unfounded", to the central registry under sub. (8).

(d) *Indepenednt investigation.* If an agent of an investigating agency is the subject of the initial report, an independent investigation shall be conducted by the department or by another agency designated by the department.

(4) Immunity from liability. Any person or institution participating in good faith in the making of a report, ordering or taking of photographs or ordering or performing medical examinations of a child under this section shall have immunity from any liability, civil or criminal, that results by reason of the action. For the purpose of any proceeding, civil or criminal, the good faith of any person reporting under this section shall be presumed.

(5) Coroner's report. Any person or official required to report cases of suspected child abuse or neglect who has reasonable cause to suspect that a child died as a result of child abuse or neglect shall report the fact to the appropriate medical examiner or coroner. The medical examiner or coroner shall accept the report for investigation and shall report the findings to the appropriate district attorney, the department, the county agency and, if the institution making their report initially is a hospital, to the hospital.

(6) Penalty. Whoever wilfully violates this section by failure to file a report as required, may be fined not more than $100 or imprisoned not more than 6 months or both.

(7) File of preliminary reports. The department shall maintain preliminary reports filed under sub. (3)(c)2 in a separate file. The reports shall not be copied or duplicated, and all information contained therein shall be confidential except as provided in this subsection. The department may, in response to an inquiry from a county

agency about a specific child, notify the agency only that a preliminary report has been filed which names the child and identify the county agency which filed the report. Each preliminary report shall be destroyed 60 days after receipt. No information from the preliminary report may be placed in the central registry.

(8) CENTRAL REGISTRY. (a) The department shall maintain a confidential statewide central registry of child abuse and neglect reports made under sub. (3) (c) (3). The registry shall receive and maintain written reports under sub. (3) (c) 3 from county agencies of suspected child abuse or neglect cases and shall transmit information to authorized persons and agencies under sub. (10).

(b) The central registry shall be operated in such a manner as to enable the department to:

1. Provide historical information to aid local child protective service agencies in determining adequate and necessary services for abused children and their families, including immediate identification and location of prior reports of child abuse and neglect.

2. Serve as a case management tool for the department in reviewing the adequacy of local child protective efforts.

3. Aid research efforts aimed at increasing the general knowledge of child abuse and neglect.

(c) Reports of child abuse and neglect shall be maintained at the central registry in one of 2 categories: unfounded or indicated.

1. A report may be classified as "indicated" only when such a finding is supported by the required standard

of evidence available to the county agency, as provided in sub. (3) (c) 3. Indicated reports may be maintained in the central registry only when supplemental information as required under sub. (3) (c) 3 is attached.

2. A report determined by the county agency to be "unfounded" shall be classified "unfounded by reason of insufficient evidence".

(d) Investigative reports classified as "indicated" shall contain the following information: the names and addresses of the child and the child's parents or other persons responsible for his or her health and welfare; the child's age, sex and race; the nature and extent of the child's abuse or neglect, including any evidence of prior injuries, abuse or neglect, to the child or siblings; the names of the person alleged to be responsible for the abuse or neglect; family composition, including names, ages, sexes and races of other children in the home; demographic data related to census tract data; the source of the report; the person making the report, his or her occupation, and where the reporter can be reached; and the medical, legal or social disposition, including a description of any services provided. The names, addresses and all other identifying characteristics of persons named in such investigative reports shall not be placed in the central registry until the requirements of sub. (9) are met.

(e) Investigative reports classified as "unfounded" shall contain all the information required under par. (d) except names, addresses and other identifying characteristics of the persons specified in par. (d).

(f) An "indicated" report and all names, addresses and other identifying characteristics placed in the central

registry from an "indicated" report shall be destroyed 7 years after receipt of the report, unless representatives of the county agency show good reason why the information should not be destroyed.

(9) NOTIFICATION AND HEARING. (a) Within 24 hours after receipt of an investigative report classifying any cases as "indicated" under sub. (3) (c) 3, a notice of the finding shall be sent by registered mail or by personal contact from the department to the suspected person. The notice shall contain the following information:

1. An explanation of the finding of "indicated".

2. An explanation that unless a hearing is requested within 15 days from the date of the notice, the names, addresses and other identifying characteristics of persons named in the report shall be placed on the central registry.

3. A description of individuals and institutions who have access to information contained in the central registry.

4. An explanation of the procedure for requesting a hearing, a brief description of the purpose of the hearing and the hearing process, including a statement that the hearing will be held no later than 30 days after a request is made, and a statement that the suspected person has a right to representation by counsel at the hearing at his or her expense.

(b) The department shall keep a record of the notice indicating the manner in which notice was given, the name and position of the person giving notice, the name of the person notified and the time and place of the notification. The information contained in this record shall not be

placed on the central registry until the deadline for requesting a hearing has passed without a request being made or if a request for a hearing is made, until after a decision by the hearing examiner sustaining the finding of "indicated" in the investigative report.

(c) The suspected person shall have a right to a hearing no later than 30 days after the request is made. The person has a right to a hearing to determine whether the finding of "indicated" in the investigative report is based on inaccurate or insufficient evidence which would justify reclassifying the report as unfounded or modifying the information to be placed on the central registry consistent with the findings of the hearing examiner. The county agency shall be given notice of the hearing and the burden of proof in the hearing shall be on the county agency. In the hearing, the fact that there was a court finding of child abuse or neglect shall be presumptive evidence that the report was substantiated.

(d) The department shall comply with the findings of the hearing examiner regarding the reclassification of a report or the modification of information to be placed on the central registry and if the report is reclassified as "unfounded", shall destroy the report but may maintain in the central registry the information specified in sub. (8) (e). Any notices, records and other documents relating to the hearing shall be confidential and shall not be made available to any individual or institution except by court order.

(10) CONFIDENTIALITY. (a) 1. All reports and records made under this section and maintained by the department,

county agencies, the central registry and other appropriate persons, officials and institutions shall be confidential, except that confidentiality of and access to preliminary investigative reports maintained by the department shall be governed solely by sub. (7). Information shall not be made available to any individual or institution except to:

a. The subject of any report, except that the department or other governmental agency shall not release data that would identify the initial reporter;

b. Appropriate staff of the department or county agencies, who may release information to their agents or to an attending physician for treatment and diagnosis, but prior reports or a lack of prior reports shall not be the basis for the determination of whether child abuse or neglect has occurred;

c. Any court conducting child protective proceedings or any court conducting dispositional proceedings under subch. VI in which child abuse or neglect is an issue; and

d. Any person engaged in bona fide research, with the permission of the department, provided, however, that information identifying the subjects of the reports and the reporters shall not be made available to the researcher.

2. Notwithstanding subd. 1, if the parents are the subject of a report, they may authorize the information to be made available to other persons. The authorization shall be in writing.

3. In this paragraph:

a. "County agency agent" means a foster parent or other person given custody of the child or a human service professional of a community board under s. 51.42 if the professional is working with the child under contract with or under the supervision of the county agency.

b. "Subject" means the child, parents and any person who is alleged or determined to have abused or neglected the child, who is mentioned by name in a report.

c. "Reporters" means all persons and institutions who report abuse or neglect under this section.

(b) Any person who violates this subsection, or who permits or encourages the unauthorized dissemination or use of information contained in the central registry and in reports and records made under this section may be fined not more than $1,000 or imprisoned not more than 6 months or both.

(11) EDUCATION, TRAINING AND PROGRAM DEVELOPMENT AND COORDINATION. (a) The department and county agencies to the extent feasible shall conduct continuing education and training programs for state and county department staff, persons and officials required to report, the general public and others as appropriate. The programs shall be designed to encourage reporting of child abuse and neglect, to encourage self-reporting and voluntary acceptance of services and to improve communication, cooperation and coordination among all agencies in the identification, prevention and treatment of child abuse and neglect. The department and county agencies shall develop public information programs about child abuse and neglect.

(b) The department shall to the extent feasible ensure that there are available in the state administrative procedures, personnel trained in child abuse and neglect,

multidisciplinary programs and operational procedures and capabilities to deal effectively with child abuse and neglect cases. These procedures and capabilities may include, but are not limited to, receipt, investigation and verification of reports; determination of treatment or ameliorative social services; or referral to the appropriate court.

(c) In meeting its responsibilities under par. (a) or (b), the department or a county agency may contract with any public or private organization which meets the standards set by the department. In entering into the contracts the department or county agency shall give priority to parental organizations combating child abuse and neglect.

(12) ANNUAL REPORTS. No later than August 1 of each year the department shall prepare and transmit to the governor and the legislature a report on the status of child abuse and neglect programs. The report shall include a full statistical analysis of the child abuse and neglect reports made through the last calendar year, an evaluation of services offered under this section and their effectiveness, and recommendations for additional legislative and other action to fulfill the purpose of this section. The department shall provide statistical breakdowns by county, if requested by a county.

QUESTIONS PRESENTED

1. Whether a due process violation can be based on a County's failure to prevent physical abuse inflicted by a natural father on his child when the County's sole involvement in the situation is that it had been providing social services to the family in question on a voluntary basis?

2. Whether county officials can be found to have acted with the intent necessary to establish a due process violation when, in the course of providing voluntary social services to a family, the officials concluded that, in their professional judgment, there was an insufficient statutory basis to seek judicial intervention which, in turn, may have led to the termination of a natural parent's constitutionally protected custodial rights?

3. Whether a County and its Department of Social Services can be held liable in a Section 1983 action where the County's express policy is to attempt to protect against the injury that occurred and where the employees who allegedly failed to prevent that injury lacked policy-making authority under state law?

4. Whether county employees are entitled to a qualified immunity in a Section 1983 action where the constitutional violation that they are charged with would be recognized for the first time by this Court in the case involving those employees and where the only relevant, established constitutional rights at the time the employees acted were those of a natural father in not having his relationship with his child improperly terminated?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
STATEMENT	1
SUMMARY OF ARGUMENT	7
ARGUMENT	11
I. THERE IS NO CONSTITUTIONAL VIOLATION IN THIS CASE BECAUSE THE WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES DID NOT DEPRIVE PETITIONERS OF THEIR LIBERTY	11
A. The Constitution Imposes No General Duty On The Government To Protect Its Citizens From Private Violence	11
B. There Is Insufficient Government Action In This Case To Transform Petitioners' Private Injury Into a Constitutional Deprivation	14
1. The General Requirement That The State Must Actively Inflict Injury Before It May Be Held Liable For A Constitutional Violation Flows Directly From The Due Process Clause As Well As The Provisions Of Section 1983	15
2. Only Where A State Has Deprived A Person Of His Liberty, And Thereby Assumed Responsibility For That Person's Welfare, May An Affirmative Duty To Protect Against Conduct By Third Parties Arise	24
C. State Law Does Not Create A Liberty Or Property Interest Applicable To This Case	26
II. THE ALLEGED INACTION OF THE RESPONDENTS DOES NOT EVINCE THE STATE OF MIND NECESSARY TO INVOKE FOURTEENTH AMENDMENT PROTECTIONS	30

TABLE OF CONTENTS—Continued

III. SINCE NO GOVERNMENTAL POLICY OR CUSTOM INFLICTED THE INJURIES COMPLAINED OF, PETITIONERS HAVE NO SECTION 1983 CLAIM AGAINST THE WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES OR WINNEBAGO COUNTY.. 35

IV. THE CLAIMS AGAINST THE INDIVIDUAL RESPONDENTS MUST BE DISMISSED BECAUSE THEY ARE ENTITLED TO QUALIFIED IMMUNITY 37

CONCLUSION 39

TABLE OF AUTHORITIES

Cases — Page

Anderson v. Creighton, 107 S. Ct. 3034 (1987) 38
Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1987) (en banc) 13, 21, 30, 32
Baker v. McCollan, 443 U.S. 137 (1979) 11
Blum v. Yaretsky, 457 U.S. 991 (1982) 16
Board of Regents v. Roth, 408 U.S. 564 (1972) 29
Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982) 13
Bradberry v. Pinellas County, 789 F.2d 1513 (11th Cir. 1986) 21
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 16
City of Canton v. Harris, pending, No. 86-1088 19
City of Springfield v. Kibbe, 107 S. Ct. 1114 (1987) 18
City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988) 10, 19
Commonwealth Bank & Trust Co. v. Russell, 825 F.2d 12 (3d Cir. 1987) 22
Daniels v. Williams, 474 U.S. 327 (1986) ..... *passim*
Davidson v. Cannon, 474 U.S. 344 (1986) ..... *passim*
Davis v. Scherer, 468 U.S. 183 (1984) 38
Doe v. New York Dep't of Social Services, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983) 21
Ellsworth v. City of Racine, 774 F.2d 182 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986) 21
Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985) 7, 22
Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir.), *cert. denied*, 107 S. Ct. 270 (1986) 13, 21
Estelle v. Gamble, 429 U.S. 97 (1976) ..... *passim*
Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) 16
Ford v. Wainwright, 477 U.S. 399 (1986) 28
Fox v. Custis, 712 F.2d 84 (4th Cir. 1983) 13, 22
Griffen v. Breckenridge, 403 U.S. 88 (1971) 18
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 10
Harpole v. Arkansas Dep't of Human Services, 820 F.2d 923 (8th Cir. 1987) 21
Harris v. McRae, 448 U.S. 297 (1980) 12

TABLE OF AUTHORITIES—Continued

	Page
Hewitt v. Helms, 459 U.S. 460 (1983)	21, 28
Hodorowski v. Ray, 844 F.2d 1210 (5th Cir. 1988)	32, 39
Hudson v. Palmer, 468 U.S. 517 (1984)	29
Humann v. Wilson, 696 F.2d 783 (10th Cir. 1983)	13
Ingraham v. Wright, 430 U.S. 651 (1977)	8, 28
Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984)	21
Jackson v. Joliet, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984)	21
Janan v. Trammell, 785 F.2d 557 (6th Cir. 1986)	13
Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985)	22
Ketchum v. Alameda County, 811 F.2d 1243 (9th Cir. 1987)	13, 22
Kurzawa v. Mueller, 732 F.2d 1456 (6th Cir. 1984)	39
Lassiter v. Department of Social Services, 452 U.S. 18 (1981)	31
Lindsey v. Normet, 405 U.S. 56 (1972)	12
Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)	14, 16
Maher v. Roe, 432 U.S. 464 (1977)	12, 25
Malachowski v. City of Keene, 787 F.2d 704 (1st Cir.), *cert. denied*, 107 S. Ct. 107 (1986)	39
Martinez v. California, 444 U.S. 277 (1980)	*passim*
McClary v. O'Hare, 786 F.2d 83 (2d Cir. 1986)	21
McNamara v. San Diego Dep't of Social Services, *pending*, No. 87-5840	33
Meyers v. Contra Costa County Dep't of Social Services, 812 F.2d 1154 (9th Cir.), *cert. denied*, 108 S. Ct. 98 (1987)	39
Monell v. Department of Social Services, 436 U.S. 658 (1978)	10, 18, 19, 35
National Board of Y.M.C.A. v. United States, 395 U.S. 85 (1969)	13, 17
Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987)	21
North Georgia Finishing Co. v. Di-Chem, Inc., 419 U.S. 601 (1975)	16
Oklahoma City v. Tuttle, 471 U.S. 808 (1985)	10, 19, 34
Olim v. Wakinekona, 461 U.S. 238 (1983)	28

TABLE OF AUTHORITIES—Continued

	Page
Parratt v. Taylor, 451 U.S. 527 (1981)	*passim*
Paul v. Davis, 424 U.S. 693 (1976)	23
Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)	19, 35
Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984)	27
Polk County v. Dodson, 454 U.S. 312 (1981)	10, 17, 34
Rankin v. City of Wichita Falls, 762 F.2d 444 (5th Cir. 1985)	21
Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985)	29
Rizzo v. Goode, 423 U.S. 362 (1976)	19, 20
Robinson v. Via, 821 F.2d 913 (2d Cir. 1987)	39
Santosky v. Kramer, 455 U.S. 745 (1982)	31, 32, 38
Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)	16
Snowden v. Hughes, 321 U.S. 1 (1944)	27
Stanley v. Illinois, 405 U.S. 645 (1972)	9, 31, 33, 38
Strauss v. City of Chicago, 760 F.2d 765 (7th Cir. 1985)	36
Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)	20
Tulsa Professional Collection Services, Inc. v. Pope, 108 S. Ct. 1340 (1988)	16
Turner v. United States, 248 U.S. 354 (1919)	12
United States v. Price, 383 U.S. 787 (1966)	16
Washington v. District of Columbia, 802 F.2d 1478 (D.C. Cir. 1986)	21
West v. Atkins, 108 S. Ct. 2250 (1988)	11, 25
Whitley v. Albers, 475 U.S. 312 (1986)	34
Wideman v. Shallowford Community Hosp., Inc., 826 F.2d 1030 (11th Cir. 1987)	13
Youngberg v. Romeo, 457 U.S. 307 (1982)	*passim*

Statutes

42 U.S.C. § 1983	*passim*
42 U.S.C. § 1986	18
§ 46.22, Wis. Stats.	10, 36

TABLE OF AUTHORITIES—Continued

	Page
§ 48.025, Wis. Stats.	2
§ 48.09, Wis. Stats.	2
§ 48.13(3), Wis. Stats.	4, 28
§ 48.20, Wis. Stats.	2
§ 48.21, Wis. Stats.	2
§ 48.25, Wis. Stats.	28
§ 48.31, Wis. Stats.	28, 32
§ 48.207, Wis. Stats.	2
§ 48.245, Wis. Stats.	3
§ 48.981, Wis. Stats.	2, 4, 5, 23, 27
§ 893.80(3), Wis. Stats.	29

Other Authorities:

Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405 (1977)	29
Prosser and Keeton, *The Law of Torts* § 34 (5th Ed. 1984)	31

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 87-154

JOSHUA DESHANEY, a Minor, by his Guardian ad litem, and MELODY DESHANEY,
Petitioners,

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES; WINNEBAGO COUNTY; ANN KEMMETER and CHERYL STELSE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS

STATEMENT

Respondent Ann Kemmeter, a social worker with the Winnebago County Department of Social Services, first came into contact with Joshua DeShaney on January 22, 1983. (J.A. 95.) On that date, Dr. Gehringer, a pediatrician at the Theda Clark Regional Medical Center, examined Joshua's multiple contusions and recommended that the child be admitted to the hospital because of "possible" child abuse. (J.A. 87, 95.) The hospital then con-

tacted the Department, which in turn requested that an intake worker at the Winnebago County Circuit Court place temporary custody of Joshua with the hospital. (J.A. 88, 96.) Pursuant to the provisions of § 48.025 and § 48.207, Wis. Stats., the request was granted. (*Id.*)

Three days later, the hospital convened a child protection team to consider Joshua's case. (J.A. 88, 96.) [1] After the team discussed the child's condition in detail, the assistant corporation counsel—charged by Wisconsin law with commencing any court action in cases of suspected child abuse, *see* § 48.09, Wis. Stats.—indicated that there was insufficient evidence to take the matter into Juvenile Court. (J.A. 89, 93, 97.) Subsequently, as required by § 48.981(3)(c)(3), Wis. Stats., the Department filed a report with the State of Wisconsin concluding that the suspicion of abuse was "unfounded." (J.A. 89,97.)

Based on the recommendation of the Theda Clark child protection team—and as mandated by Wisconsin law [2]—custody of Joshua was returned to his father, Randy DeShaney, on January 25, 1983. (J.A. 114.) On February 14, 1983, the Winnebago County Juvenile

[1] The team included Dr. Gehringer, Dr. Derozier (a clinical psychologist who had examined Joshua DeShaney), Tom Hoare (the hospital social worker), Respondent Ann Kemmeter, Respondent Cheryl Stelse (Ann Kemmeter's suprevisor), John Bodnar (Assistant Corporation Counsel for Winnebago County), and Keith Nelson (Neenah Police Department detective), along with various other hospital personnel. (J.A. 89, 96-97.)

[2] The Wisconsin statutory scheme required the return of Joshua to his natural father "as soon as is reasonably possible." *See generally* §§ 48.20, 48.21, Wis. Stats. The hospital's temporary physical custody could only have been maintained if a petition initiating proceedings under Chapter 48 of the Wisconsin Statutes had been filed by a "district attorney, city attorney or corporation counsel or other appropriate officials specified under s. 48.09." If a hearing is not held within forty-eight hours, the "juvenile court Commission shall order the child's immediate release from custody." § 48.21(1)(b), Wis. Stats.

Intake Court closed the child protective case; thereafter, the County's involvement with the DeShaney family was on a voluntary "family services" basis. (J.A. 90, 97-98.)

In particular, between February 14, 1983 and March 8, 1984, Ann Kemmeter continued to work with the DeShaney family.[3] The family entered into a voluntary and non-binding "social services agreement" with the Department, specifying the services to be afforded as "Individual and Family Adjustment," "Education," "Employment," and "Health." [4] Respondent Kemmeter thus focused her efforts on proper parenting and appropriate disciplinary techniques, and she observed the family setting when circumstances permitted. (J.A. 99.) During her thirteen months of working with the DeShaney family, she made approximately twelve home visits and attempted five more. (J.A. 98, 99.)[5]

Pursuant to the procedures of the Department of Social Services, Respondent Kemmeter maintained an ongoing case narrative relating to her involvement with the DeShaney family, which is reproduced in the Joint Appendix at 110-46. In this narrative, she expressed her "concern" and "suspicion" related to the possibility of child abuse occurring within the DeShaney family, but also felt that "[n]one of this can be proven, and at this

[3] It was the practice of the Department to keep a specific voluntary family services case assigned to the worker that was originally involved with the case in the child protection services phase, even after the original referral had been deemed "unfounded."

[4] Judge Posner in the decision below incorrectly assumed that the written agreement was entered into pursuant to the provisions of § 48.245, Wis. Stats., and was therefore binding. *See* Pet. App. at 36-37. Because the agreement with Mr. DeShaney was not entered into by an "intake worker" as part of an "informal disposition," however, § 48.245, Wis. Stats. is inapplicable by its terms.

[5] It was Department policy for a caseworker to make one attempted home visit per month on any open family services case. (J.A. 90.)

point of time, none of them [*i.e.*, the injuries] are serious enough to warrant court intervention." (J.A. 118-20.) Respondent Cheryl Stelse, Kemmeter's immediate supervisor, concurred in this conclusion.

Prior to March 9, 1984, there were no further reports of suspected child abuse of the kind that would have been sufficient to trigger an investigation under § 48.981, Wis. Stats. Moreover, at no point after the January 25, 1983, team meeting and prior to March 8, 1984, did Respondents Kemmeter and Stelse ever feel that there was sufficient evidence or facts pertaining to Joshua to take the matter to the Assistant Corporation Counsel for referral to court in an attempt to remove the child from his natural father. (J.A. 91, 99.) [6] On March 8, however, Joshua was taken to the emergency room and operated on after allegedly being beaten by his father. Winnebago County subsequently took custody of Joshua; his father was prosecuted for and convicted of child abuse.

Based on these events,[7] Joshua and Melody DeShaney brought suit against Respondents in the District Court

[6] John Bodnar, the Assistant Corporation Counsel primarily involved in Juvenile Court matters for Winnebago County, has also stated that, after reviewing all of the information and facts assembled by the Winnebago County Department of Social Services from January 25, 1983, up to the alleged incident of March 8, 1984, at no point was there sufficient information or facts presented to pursue Joshua's case in Juvenile Court under § 48.13(3), Wis. Stats. (J.A. 93-94.)

[7] Even when measured against the standards applicable to a summary judgment motion, the inaccuracies and unsupported facts set forth in Petitioners' brief are grossly unfair. A small sampling of these mischaracterizations includes: *Pet. Br. at 4*—Petitioners state that in January, 1983 Joshua was seen in a local emergency room "as a victim of child abuse." This refers to the initial hospitalization when Joshua was admitted because of "possible child abuse," a suspicion that was never confirmed. *Pet. Br. at 5*—Petitioners contend that nothing was done to follow up on a November 30, 1983 "written child abuse report," "despite a clear statutory

for the Eastern District of Wisconsin, alleging violations of the Due Process Clause of the United States Constitution and 42 U.S.C. § 1983.[8] In general, Petitioners

mandate." The written referral, however, was not made pursuant to § 48.981(3)(a), Wis. Stats. Furthermore, the form was not interpreted by others to constitute a formal diagnosis of child abuse. (J.A. 176.) *Pet. Br. at 6*—Petitioners state that a Head Start worker found Joshua at home alone and telephoned the Department on two separate occasions to inform it of his "immediate jeopardy" and that "no action whatever was taken." The Head Start worker on the day of the incident, however, merely left a message with a switchboard operator for Respondent Kemmeter to call. When Kemmeter was eventually able to contact her, she admonish the Head Start worker and advised that it would have been wise for her to either have gone to the police or to another person in the Department so that the message got through. (J.A. 178.) Furthermore, Joshua's parents were confronted with the situation, but they stated that they had just gone to use the pay phone on the corner and were out for only fifteen minutes. (J.A. 180-81.) *Pet Br. at 6*—Petitioners state that Kemmeter observed what "she 's repeatedly described as cigarette burns" on Joshua's face. After a home visit on November 9, 1983, however, Kemmeter indicated only that she had observed marks on the child's chin and "wondered" if they might have been cigarette burns. When the parents were questioned about the matter, they stated that Joshua had been outside and had scraped his chin on the sidewalk. (J.A. 168, 179-80.)

Not to be outdone by the Petitioners' factual recitation, the A.C.L.U.'s *amicus curiae* brief incorrectly states, without any reference to the record, that the "Respondents received no fewer than eleven reports that Joshua was being beaten by his father or other adults in his father's home." They go on to state, again without record support, that "on at least four other occasions, hospital officials who treated Joshua notified the State Protection System that Joshua was being abused."

[8] Melody DeShaney is Joshua's natural mother. After divorce proceedings between Randy and Melody, a Wyoming court transferred legal custody of Joshua to Randy. (J.A. 84-85.) Thereafter, Melody DeShaney never requested that legal custody be transferred back to her. Joshua is presently in the custody of Winnebago County and lives in a group home.

claimed that their injuries were caused by the failure of Respondents, Winnebago County Department of Social Services and its employees, to properly supervise, protect and monitor the welfare of Joshua DeShaney.[9]

The District Court granted Respondents' motion for summary judgment, noting that, if Petitioners' arguments were accepted, "it would provide claims under Section 1983 to Plaintiffs whose injuries have little or nothing to do with the arbitrary use of governmental power for purposes of oppression," and that "[e]very social welfare program would become a charter of constitutionally sanctioned social and economic 'rights' which, unlike the civil and political rights traditionally protected by § 1983, require much more than the restraint of governmental power to 'guarantee.'" Pet. App. 55-56.

The United States Court of Appeals for the Seventh Circuit affirmed. In an opinion by Judge Posner, the court concluded that "the state's failure to protect people from private violence or other mishaps not attributable to the conduct of its employees is not a deprivation of constitutionally protected property or liberty. . . . The men who framed the original Constitution and the Fourteenth Amendment were worried about government's oppressing the citizenry rather than about its failing to provide adequate social services." Pet. App. 39 (citations omitted). In addition, relying on this Court's decision in *Martinez v. California*, 444 U.S. 277, 285 (1980), the Court of Appeals further held that a "deprivation in the constitutional sense requires more than a minimal or fictitious causal connection between the action of the state and the injury of the plaintiff." Pet. App. 42. Disagreeing

[9] Despite these allegations, Petitioners acknowledge that, as stated in their complaint, "[a]t all relevant times to and until March 8, 1984, Joshua DeShaney was in the custody and control of Defendant, Randy DeShaney." (J.A. 6.)

with the Third Circuit's decision in *Estate of Bailey by Oare v. County of York*, 786 F.2d 503 (1985), the Seventh Circuit stated that "[w]e can find no basis in the language of the due process clauses or the principles of constitutional law for a general doctrine of 'special relationship.'" Pet. App. at 43.

SUMMARY OF ARGUMENT

This case involves a Section 1983 claim for damages based upon the alleged failure of a County and its employees to protect a child from abuse inflicted by his father. Petitioners' claim is barred for several independent legal reasons, each of which requires affirmance of the judgment below.

1. Petitioners have failed to show any constitutional deprivation by a state actor, an essential prerequisite in a Section 1983 case based on an alleged violation of the Due Process Clause. The harm to Joshua DeShaney was inflicted by his father, whose actions were not merely independent of any governmental entity or person, but in flat derogation of government policy, as Petitioners themselves concede. Pet. Br. at 19. To fill this fatal void, Petitioners attempt to fashion a new constitutional duty, supposedly based on a "special relationship"—*i.e.*, that the Respondent County had undertaken to provide child protection services and that the government officials performing these services were aware of Petitioner's potential plight but failed to protect him. This effort to transform a privately inflicted harm into a governmental deprivation stretches the Due Process Clause well beyond its breaking point.

Petitioners recognize, as they must, that "there is no generalized duty on a state or municipality to provide affirmative protection to members of the public at large." Pet. Br. at 12-13. Nor is there any warrant for requiring a state or county that wishes to provide family services to do so at its constitutional peril. Whether those

services ultimately accomplish their goal will depend on a variety of factors, many of which are clearly beyond the government's power to control. Moreover, the efficacy of any such governmental program necessarily depends in part on the availability of funding and thus implicates complicated allocative decisions that cut across the spectrum of public services. In these circumstances, the government's inability to achieve perfection simply cannot be equated with the kind of "affirmative abuse of power" needed to establish a due process violation. *Daniels v. Williams*, 474 U.S. 327, 330 (1986) (quoting *Parratt v. Taylor*, 451 U.S. 527, 549 (1981) (Powell, J., concurring)).

The cases relied on by Petitioners and their supporting *amici* are simply inapposite. The government here neither inflicted the injury, *see, e.g., Ingraham v. Wright*, 430 U.S. 651 (1977), nor otherwise deprived Petitioner of his liberty, thereby creating ancillary constitutional obligations to provide affirmative services like medical care or a safe environment. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982); *Estelle v. Gamble*, 429 U.S. 97 (1976). The government's action in those cases —either through direct infliction or through an initial deprivation of liberty that both renders an individual wholly dependent upon the government for protection and provides the government the degree of control necessary for it to afford reasonably effective protection— is properly viewed as sufficient to make out a "deprivation in the *constitutional sense*." *Daniels, supra*, 474 U.S. at 329 (quoting *Parratt, supra*, 451 U.S. at 548 (Powell, J., concurring)) (emphasis in original). But where all that the government has done is to provide voluntary family counseling in a case that involves a privatey inflicted injury, the resulting harm is "too remote a consequence" of governmental action to make out such a deprivation. *Martinez, supra*, 444 U.S. at 285.

2. Even assuming that Petitioners had properly alleged a constitutional deprivation, their claims would still be barred because they do not, and could not, show that Respondents acted with the requisite "state of mind" for a due process violation. The Fourteenth Amendment constrains only "real *abuses* by state officials in the exercise of governmental powers," *Parratt, supra*, 451 U.S. at 549 (Powell, J., concurring) (emphasis in original), and therefore demands a high level of intent before liability may be imposed. The appropriate standard in a case like this one—which involves a claim of government *inaction* and requires the balancing of a child's potential rights against those of his family—should be the "deliberate indifference" test. *See Estelle, supra*. The alternatives proposed by petitioners—gross negligence or recklessness—readily blur into the negligence standard previously rejected by this Court, *see Daniels, supra*, 474 U.S. at 330; *Davidson v. Cannon*, 474 U.S. 344 (1986), and simply do not reflect the kind of "*deliberate* decisions of government officials" required by the Due Process Clause. *Daniels, supra*, 474 U.S. at 331 (emphasis in original) (citations omitted).

In the present case, it cannot plausibly be claimed that Respondents acted with deliberate indifference toward any rights that Petitioner may have had. On the contrary, for more than a year they provided voluntary counseling to the DeShaney family. In that capacity, while remaining attentive to the child's situation, Respondents also had to be respectful of the constitutional rights of a natural parent regarding the privacy and integrity of family life. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972). With the benefit of hindsight, it may now be said that a tragedy occurred. But that tragedy was hardly the product of any purposeful or deliberate indifference on the part of Respondents. *See Davidson, supra*, 474 U.S. at 348.

3. The County and its Department of Social Services must be dismissed for the separate reason that Petitioners can point to no policy or custom directly leading to the alleged violation of their rights. *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981). On the contrary, even Petitioners have acknowledged that "the state and county had expressed specific policies and intentions *to seek out and prevent child abuse.*" Pet. Br. at 19. (emphasis supplied). In the face of this recognition, the highly discretionary decisions of front-line social workers—who lacked any policymaking authority under state law (§ 46.22, Wis. Stats.)—provide no basis for holding the county Respondents liable. *See City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988) (plurality opinion); *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (plurality opinion).

4. Finally, the individual Respondents in this case are further protected from liability on the basis of the qualified immunity doctrine. Under that doctrine, an official cannot be held responsible in a damages action unless it can be shown that he or she violated a "clearly established statutory or constitutional right of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The right at issue in this case was anything but clearly established, as the decisions by both courts below and numerous others amply demonstrate.

ARGUMENT

I. THERE IS NO CONSTITUTIONAL VIOLATION IN THIS CASE BECAUSE THE WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES DID NOT DEPRIVE PETITIONERS OF THEIR LIBERTY.

To state a claim under Section 1983, a plaintiff must both allege the violation of a right secured by the Constitution and laws of the United States and show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 108 S. Ct. 2250, 2255-56 (1988). The Court has thus instructed that "the first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" *Baker v. McCollan*, 443 U.S. 137, 140 (1979) (quoting Section 1983).

Petitioner has stumbled at this threshold. Rather than demonstrating that Respondents have deprived him of a protected interest, he is able only to indicate that the Constitution accords him a liberty interest in personal security. But the identification of a constitutionally protected interest constitutes only half of a Section 1983 claim. The Due Process Clause does not protect citizens against harms inflicted by private parties, but only against deprivations of individual liberties at the hands of the government. Petitioner has failed to demonstrate that it was Winnebago County or its employees who deprived him of the constitutionally protected interest that he asserts.

A. The Constitution Imposes No General Duty On The Government To Protect Its Citizens From Private Violence.

The injuries for which Joshua DeShaney seeks redress were all inflicted by his father while Petitioner was living at home. Petitioner is thus in the same position as any other citizen who is the unfortunate victim of crime. His injury was not inflicted by the State, nor did it

occur at a time when the State had deprived him of his liberty or otherwise burdened his constitutional rights. Because the Due Process Clause imposes no obligation to protect a citizen at liberty from harms committed by private parties, Petitioner has failed to state a claim under Section 1983.

Petitioner virtually concedes that his claim falls outside the purview of the Constitution when he recognizes, as he must, that "there is no generalized duty on a state or municipality to provide protection to members of the public at large." Pet. Br. at 12-13 (citing *Martinez, supra*). *See Youngberg, supra*, 457 U.S. at 317 ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border."). Although the State may not itself invade an individual's personal security, it is not compelled by the Constitution to prevent private action from having the same effect.

The Court has thus repeatedly held that the Constitution does *not* provide an affirmative right to governmental aid, even in the pursuit of those interests that the government may not itself deprive. For example, in *Harris v. McRae*, 448 U.S. 297 (1980), the Court explicitly rejected the argument that "because government may not prohibit the use of contraceptives, or prevent parents from sending their children to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or to send their children to private schools." *Id.* at 318 (citations omitted). *See also Maher v. Roe*, 432 U.S. 464, 469 (1977) (no constitutional right to public funding of abortion); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (same for housing).

The Court has also specifically indicated that there is no affirmative constitutional obligation on the government to provide protective services. In *Turner v. United*

States, 284 U.S. 354, 358 (1919), for example, in an opinion by Justice Brandeis, the Court denied a claim for compensation arising from damages caused by mob violence, noting the "lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." The same principle underlies the more recent decision in *National Board of Y.M.C.A. v. United States*, 369 U.S. 85 (1969), where a Fifth Amendment Takings Clause claim was denied for the damage done to buildings under protective occupation during a riot in the Panama Canal zone. As Justice Harlan wrote in concurrence, "[e]very man who was robbed on the street cannot demand compensation from the government on the ground that the Fifth Amendment requires fully effective police protection at all times." *Id.* at 95.[10]

As these cases demonstrate, a plaintiff cannot avoid the constitutional requirement of state, rather thn private, action merely by rephrasing his Complaint to at-

[10] Not surprisingly, the Courts of Appeals are in unanimous agreement that the Constitution imposes no general duty on the States to provide protective services. In *Estate of Gilmore v. Buckley*, 787 F.2d 714, 720 (1st Cir.), *cert. denied*, 107 S. Ct. 270 (1986), Judge Campbell concluded that "[n]othing in the fourteenth amendment or its history . . . suggests that it was written to provide an expansive guarantee of State protective services." Judge Posner, in addition to the opinion below, has stated that there is "no constitutional right to be protected by the State against . . . criminals or madmen," and in corollary, because there is no "constitutional duty [on the State] to provide such protection its failure to do so is not actionable under Section 1983." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). The same point was later amplified by Judge Easterbrook in *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1987) (en banc). *See also Wideman v. Shallowford Community Hosp., Inc.*, 826 F.2d 1030, 1033-34 (11th Cir. 1987); *Ketchum v. Alameda County*, 811 F.2d 1243 (9th Cir. 1987); *Janan v. Trammell*, 785 F.2d 557, 560 (6th Cir. 1986); *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983); *Humann v. Wilson*, 696 F.2d 783, 784 (10th Cir. 1983).

tack official failures to prevent private deprivations. Allowing that kind of broad expansion of due process protection would not only do violence to the text of the Clause, it would also drastically alter the role of the Constitution in ordering governmental action. As the Court has explained:

> Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and Federal judicial power. *It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.* A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982) (emphasis supplied).

In sum, far from being an instrument to ensure that States act to protect their citizens, the Due Process Clause was intended to prohibit "real *abuses* by state officials in the exercise of governmental powers." *Parratt, supra*, 451 U.S. at 549 (Powell, J., concurring) (emphasis in original); *see also Daniels, supra*, 474 U.S. at 327; *Davidson, supra*, 474 U.S. at 344, 347; *Parratt, supra*, 451 U.S. 544-45 (Stewart, J., concurring).

B. There Is Insufficient Government Action In This Case To Transform Petitioners' Private Injury Into a Constitutional Deprivation.

In lieu of a general claim that a lack of protection deprived them of liberty, Petitioners attempt to narrow their position by arguing that a duty "arise[s] out of the relationship created or undertaken by the state with respect to certain parties." Pet. Br. at 13. While we agree that such a duty may be created by certain kinds of state action, the requisite state involvement is not present in this case. On the contrary, a constitutional

duty to provide protection against private harm can only arise in circumstances where the government, by its own action, has deprived an individual of his or her liberty. In that circumstance, the State may have affirmatively rendered the individual wholly dependent upon it for basic protection and, by reason of such deprivation, assumed the degree of control that enables it to provide reasonably effective protection.

1. *The General Requirement That The State Must Actively Inflict Injury Before It May Be Held Liable For A Constitutional Violation Flows Directly From The Due Process Clause As Well As The Provisions Of Section 1983.*

Under both the "state action" requirement of the Due Process Clause and the "causation" requirement of Section 1983, the government cannot be held liable for harm to a citizen at liberty unless it actively inflicts the injury. Even though the government may seek to prevent the very harm that results from third-party actions, its efforts in that regard are insufficient to justify the imposition of constitutional liability. Rather, in such circumstances, the injury for which the Plaintiff seeks redress is simply "too remote a consequence of [official's] actions to hold them responsible under the federal civil rights laws." *Martinez, supra*, 444 U.S. at 285.

This Court's proscription against attempting to "constitutionalize" such "remote consequences of official action" was firmly set forth in *Martinez*, a case involving a homicide committed by a parolee five months after his release. Noting that "it is perfectly clear that not every injury in which a State official has played some part is actionable under [Section 1983]," the Court explained:

> Although the decision to release Thomas from prison was action by the State, the action of Thomas five months later cannot be fairly characterized as state action. Regardless of whether, as a matter of State

> tort law, the parole board could be said either to have had a 'duty' to avoid harm to his victim or to have proximately caused her death, we hold that, taking these particular allegations as true, appellees did not 'deprive' appellants' decedent of life within the meaning of the Fourteenth Amendment.

Id. at 284-85 (citations omitted).

This conclusion is fully consistent with the Court's general jurisprudence in the "state action" area. Indeed, that requirement is specifically designed to separate constitutional wrongs from private ones. Although the inquiry essentially involves a case-by-case, fact-bound determination, it is nonetheless clear that private action may be attributed to the State only when the private ends were accomplished "with the overt, significant assistance of state officials." *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340, 1345 (1988).[11]

Applying the factors that are generally considered in determining whether there has been state action, it is apparent that *none* of the traditional indicia is present here. For example, child abuse is hardly "the exclusive prerogative of the State," *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982), and Respondents' attempts to intervene in Joshua's situation belie any assertion that his father was a "willful participant in joint activity with the State or its agents," *United States v. Price*, 383 U.S. 787, 794 (1966), or that there was a "symbiotic relationship" between him and the County or any of its agents. *Burton v. Wilmington Parking Authority*, 365 U.S. 715

[11] *Compare Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (no State action in private creditor's lawful self-help pursuant to the Uniform Commercial Code) *with Lugar, supra*, (ministerial State involvement implicates State action in private creditor's collection action) *and North Georgia Finishing Co. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (same) *and Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (same).

(1961). Rather, as the course of the County's investigation demonstrates, Mr. DeShaney was a suspect for child abuse—he was thus "not acting on behalf of the State; he [was] the State's adversary." *Dodson, supra*, 454 U.S. at 323 n.13.

The constitutional requirement of state action, in short, is not met when the government's efforts at providing protection, even if ultimately ineffective, do not render the intended beneficiary any worse off. As Justice Harlan explained in an analogous situation, the proper standard for allowing a Takings Clause claim for damage that was not prevented by an attempt at military protection is "when the military had reason to believe that its action placed the property in question in greater peril than if *no* form of protection had been provided at all." *National Board of Y.M.C.A., supra*, 395 U.S. at 95 (emphasis in original). According to Justice Harlan, it would be anamolous to allow no compensation to owners of unprotected property, yet allow it for those whose property was inadequately protected. "It is only if the military or other protective action foreseeably *increased* the risk of damage that compensation should be required." *Id.* at 96 (emphasis in original). By the same token, because the Fourteenth Amendment imposes no duty on States to provide any protective services at all, it would be equally anamolous to predicate liability on what is alleged to be the ineffective provision of such services.

These basic principles of due process analysis are further reinforced by the "causation" requirement established under Section 1983. By its terms, that statute applies only to a defendant who "subjects or causes to be subjected" any citizen to a constitutional deprivation. The Court has made clear that the mere failure to prevent action by another party is insufficient to meet this requirement. "[T]he fact that Congress did specifically provide that A's tort became B's liability if B 'caused'

A to subject another to a tort suggests that Congress did not intend Section 1983 liability to attach where such causation was absent." *Monell, supra*, 436 U.S. at 692. *See also City of Springfield v. Kibbe*, 107 S. Ct. 1114, 1119-21 (1987) (O'Connor, J., dissenting).[12] Indeed, even when it enacted Section 1986—the provision that does provide a cause of action for a failure to prevent private deprivations of civil rights[13]—Congress specifically *excluded* municipalities from the purview of that statute, explaining that the "Federal Government could not constitutionally require local governments to create police forces, whether this requirement was levied directly, or indirectly by imposing damages for breach of the peace on municipalities." *Monell, supra*, 436 U.S. at 673.[14]

---

[12] The debates on Section 1983 also suggest that this provision was intended to redress only active infliction and not State inaction. For example, Representative Bingham, the author of Section One of the Fourteenth Amendment, stated in the debates on Section 1983 that "[t]he States never had the right, though they had the power, to inflict wrongs upon free citizens." *Quoted in Monell, supra*, 436 U.S. at 685 n.45. He then chronicled several direct governmental deprivations that were covered by the statute, none of which were remotely similar to the claim in this case. The only indication of liability under Section 1983 for governmental inaction concerned equal protection violations, where a State denies services for discriminatory reasons. *See* remarks of Rep. Garfield, *quoted ibid.* The facts of this case implicate no such invidious discrimination.

[13] In relevant part, Section 1986 provides liability for "[e]very person who, having knowledge that [a conspiracy to violate civil rights is afoot], and having power to prevent or aid in preventing the Commission of the same, neglects or refuses so to do. . . ." Because Section 1986 specifically incorporates Section 1985, it applies only to cases involving racial or similar animus, *see Griffen v. Breckenridge*, 403 U.S. 88 (1971), and thus has no conceivable relevance to the present case.

[14] The legislative debates leading to the rejection of the so-called "Sherman Amendment," which would have included municipalities within the reach of Section 1986, is reviewed in detail in *Monell, supra*, 436 U.S. at 665-84. That discussion also fully supports the conclusion that section 1983 was not intended to apply to municipal failure to protect against the private infliction of harm.

Adherence to an "active infliction" requirement, moreover, provides the essential rationale for the ruling in *Monell* itself, where the Court held that local governments may be found liable under Section 1983 but not on a *respondeat superior* basis. If mere failure to protect were sufficient to impose liability, all Section 1983 violations perpetrated by municipal officials would lead to municipal liability on the theory that the government failed to protect the individual from its official's action. Under *Monell*, however, "it is when execution of a government's policy or custom . . . *inflicts* the injury that the government as an entity is responsible under Section 1983." *Id.* at 694 (emphasis supplied). Whatever debates have raged since *Monell* concerning when a municipality has so acted, *see, e.g., Praprotnick, supra*; *Tuttle, supra; City of Canton v. Harris, pending*, No. 86-1088, this central proposition remains essentially unchallenged.[15] Because Section 1983 liability must be predicated on active infliction, a municipality cannot be held liable for the constitutional torts of employees over whom it has "the mere right to control without any control or direction having been exercised." *Monell, supra*, 436 U.S. at 694 n.58.

The Section 1983 requirement that a Defendant actively inflict harm was also relied on in *Rizzo v. Goode*, 423 U.S. 362 (1976), where the Court refused to find constitutional liability premised on the failure of a city police department to act in the face of an alleged pattern of violations by individual officers. That theory was

---

[15] *But see Praprotnick, supra*, 108 S. Ct. at 924 n.1 (Stevens, J., dissenting); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 489 n.4 (1986) (Stevens, J., concurring); *Tuttle, supra*, 471 U.S. at 834-44 (Stevens, J., dissenting).

deemed insufficient precisely because the department itself did not actively inflict the harm, and hence it caused no constitutional deprivation.[16] The Court thus distinguished *Rizzo* from *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), noting that in the latter case, "segregation imposed by law had been implemented by state authorities for varying periods of time, whereas in the instant case the District Court found that the responsible authorities had played *no affirmative part* in depriving any member of the two respondent classes of any constitutional rights." 423 U.S. at 377 (emphasis supplied). For the same reasons, Respondents in this case do not fall on the liability side of the "affirmative" deprivation line drawn in *Rizzo, supra.* Petitioners' claimed violation notwithstanding, none of the Respondents can properly be "found by their *own* conduct . . . to have denied those rights." *Ibid.* (emphasis in original).

---

[16] As the Court stated in *Rizzo*:

> The theory of liability underlying the District Court's opinion, and urged upon us by respondents, is that even without a showing of direct responsibility for the actions of a small percentage of the police force, petitioners' *failure* to act in the face of a statistical pattern is indistinguishable from the active centage of the police force, petitioners' failure to act in the conduct enjoined in *Hague* [*v. CIO*, 307 U.S. 496 (1939)] and [*Allee v.*] *Medrano* [, 416 U.S. 802 (1974)]. Respondents posit a constitutional "duty" on the part of petitioners (and a corresponding "right" of the citizens of Philadelphia) to "eliminate" future police misconduct; a "default" of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in petitioners' stead and take whatever preventive measures are necessary, within its discretion, to secure the "right" at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983. We have never subscribed to these amorphous propositions and we decline to do so now.

423 U.S. at 375-76 (emphasis in original).

This active infliction requirement—common to both state action under the Fourteenth Amendment and causation under Section 1983—is especially important in a case such as this, where governmental services have been provided but are argued to have been inadequate. "It would be ironic that when a State embarks on such a desirable experiment it thereby opens the door to scrutiny by the Federal Courts, while States that choose not to adopt such [laws] entirely avoid the strictures of the due process clause." *Hewitt v. Helms*, 459 U.S. 460 (1983). An active infliction requirement thus serves the important function of differentiating between the provision of imperfect services and the abuse of government power with the intention to oppress, only the latter being within the province of the Fourteenth Amendment. *See generally, Daniels, supra; Davidson, supra.*[17]

---

[17] The active infliction requirement has generally been followed by all but one of the Circuits, although two others in dicta have allowed for the possibility of broader liability. The District of Columbia, First, Second, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits have all found that the State is constitutionally obligated to provide protection only when the State has actively inflicted harm by putting that individual in a worse position than he would have been in had the State not been involved. *See Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986); *Estate of Gilmore v. Buckley*, 787 F.2d 714, 721 (1st Cir.) *cert. denied*, 107 S.Ct. 270 (1986); *McClary v. O'Hare*, 786 F.2d 83, 88-89 (2nd Cir. 1986); *Doe v. New York Dep't of Social Services*, 649 F.2d 134, 141 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983); *Rankin v. City of Wichita Falls*, 762 F.2d 444, 449 (5th Cir. 1985); *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987); *Ellsworth v. City of Racine*, 774 F.2d 182, 185 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (en banc); *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); *Harpole v. Arkansas Dep't of Human Services*, 820 F.2d 923 (8th Cir. 1987); *Bradberry v. Pinellas County*, 789 F.2d 1513, 1517 (11th Cir. 1986).

Somewhat less settled is the rule in the Fourth and Ninth Circuits, whose holdings comport with this test but, under the aegis of "special relationship," allow in dicta that "a right to protection

Judged against these established principles, Petitioners' suggested criteria, *see* Pet. Br. at 14-15, must be rejected as an unprecedented theory of Section 1983 liability that drifts free of any constitutional or statutory moorings. The criterion of *prior* custody is clearly too broad to reflect active State infliction of harm. Obviously, the State does not become a lifetime guarantor of an individual's safety by having once taken him into custody. Thus, while current custody means that the State is depriving an individual of his liberty and therefore may be required to provide protection during the time of actual deprivation, *see* pp. 24-26 *infra*, post-release reliance on prior custody fails to distinguish between a cause that is direct and one that is too removed in time and consequence to have any constitutional bearing. *See Martinez, supra.* By the same token, the State's expressed desire to help children through the provision of protective services can in no way be seen as contributing to, let alone as inflicting, abuse on a child. If anything, such a policy stands as an impediment to that result. And even though the State may have knowledge of a child's potential plight, that knowledge neither caused the child's problem, worsened it, or made it more likely to occur.[18]

---

could arise from a custodial *or other relationship.*" *Jensen v. Conrad*, 747 F.2d 185, 194 & n.11 (4th Cir. 1984) (emphasis in original), *cert. denied*, 470 U.S. 1052 (1985); *Fox, supra*, 712 F.2d at 88; *see also Ketchum, supra*, 811 F.2d at 1247 (noting awareness of specific risk of harm as possible basis of duty in addition to custody or placing victim in danger).

The Third Circuit in *Bailey, supra*, on which Petitioners have placed continued reliance, thus stands alone. It is the only Circuit to have applied a test of broader liability for the failure to provide protective services. It should be noted, however, that the author of *Bailey* may have limited even that holding when it was later distinguished in *Commonwealth Bank and Trust Co. v. Russell*, 825 F.2d 12, 16 (3rd Cir. 1987).

[18] Petitoners claim that:

> Only the DSS is authorized (or required) to investigate the suspicion of abuse or neglect, and only the DSS is empowered to do anything about it, including bringing the matter to court for hearing and determination. *Every other person outside DSS, although obligated to report to DSS, is utterly disabled from acting on behalf of the endangered child.* Everything must go to DSS, and only DSS is authorized to act.

Pet. Br. at 27 (emphasis supplied). Even if true, this assertion would not make the State's action sufficient to amount to a deprivation.

The assertion is also incorrect, however. Chapter 48 of the Wisconsin Statutes (a portion of which are appended to Petitioners' Brief) indicates that the persons enumerated therein, having reasonable cause to suspect child abuse or neglect, shall contact the County agency *or* Sheriff *or* City Police Departments. *See* § 48.981 (2) and (3), Wis. Stats. Furthermore, any person suspecting abuse or neglect may request an immediate investigation by the *Sheriff* or *Police* Department. *See* § 48.981(3)(b)1, Wis. Stats. Finally, contrary to Petitioners' representation, it is not the Department that has the final authority "to act," but rather it is the Corporation Counsel who is charged with the responsibility of seeking Court intervention. *See* 48.09. And it was Assistant Corporate Counsel John Bodnar who, in this case, decided against that option. *See supra* at 2, 4 n.6.

In sum, the specific governmental actions relied on by Petitioners are not sufficiently related to the harm he alleges to warrant converting a private wrong into a "constitutional deprivation" cognizable under Section 1983. While these kinds of considerations may possibly have relevance to a general tort law claim, *see Martinez, supra*, 444 U.S. at 284-85, the Court has repeatedly "rejected reasoning that would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Daniels, supra*, 474 U.S. at 332 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)). There is no justification for departing from this settled approach in the instant case.

2. *Only Where A State Has Deprived A Person Of His Liberty, And Thereby Assumed Responsibility For That Person's Welfare, May An Affirmative Duty To Protect Against Conduct By Third Parties Arise.*

There is one exception to the basic rule that requires the State to have affirmatively inflicted the harm for which an individual seeks redress under the Due Process Clause: *i.e.*, where harm is inflicted at a time when the State has burdened an individual's constitutional interests by depriving that person of his liberty.[19] Under such circumstances, a State may be made to assume certain substantive due process obligations that it would not otherwise have. This exception is not applicable in the instant case, however, as the private harm was not inflicted upon the Petitioner at a time when his liberty interests were being compromised by any action of the State.

The cases from this Court primarily relied upon by Petitioners and their supporting *amici* all fit within this recognized exception. Far from supporting Petitioners' position, these cases demonstrate that certain narrowly defined substantive rights arise from a prior deprivation that places the individual in an environment created by the State and where the State has made him dependent on it as a direct result of that initial deprivation. Only when such a deprivation "renders a person vulnerable and strips him of his ability to defend himself" may subsequent injury—even if not directly inflicted by a state actor—be fairly attributed to the State. *Davidson*, *supra*, 474 U.S. at 355 (Blackman, J., dissenting).

---

[19] This Court has also noted that, even where such narrowly defined circumstances exist, the State shall "necessarily have considerable discretion in determining the nature and scope of its responsibilities." *Youngberg*, *supra*, 457 U.S. at 317.

Thus, in *Estelle*, *supra*, for example (Pet. Br. at 9, 12, 29), the Court held that the Constitution imposes an affirmative obligation on prison officials to provide medical care to convicts even though there is clearly no general obligation on the State to provide such services to its citizens. *See Maher v. Roe*, *supra*. Having taken a prisoner into custody, the State effectively removes his ability to secure self-help and forces him to "rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Estelle*, *supra*, 429 U.S. at 103. As the Court elaborated last Term, when the State fails to provide care in this situation, "the resultant deprivation was caused, *in the sense relevant for state-action inquiry*, by the State's exercise of its right to punish [an individual] by incarceration and to deny him a venue independent of the State to obtain needed medical care." *West*, *supra*, 108 S. Ct. at 2259 (emphasis supplied). The same rationale also supports the decision in *Youngberg*, *supra*, where the Court first reaffirmed its general rule that "a state is under no constitutional duty to provide substantive services for those within its border," and then noted the narrow exception to this rule in situations where "a person is *institutionalized and wholly dependent* upon the state." 457 U.S. at 317 (emphasis supplied).

The rationale for this exception has no applicability to the instant case, however. The harms inflicted on Petitioner occurred not when he was in state custody, but rather while he was at liberty. Having created no affirmative obligation through an initial deprivation, therefore, the State was not burdened with the obligation—nor, indeed, endowed with the ability—to protect Petitioner against the unfortunate perils that face those who remain at liberty. It was thus free to attempt to monitor his situation and to help, if possible, without exposing itself to constitutional liability if its efforts ultimately proved to be unsuccessful.

The rule that Petitioners have proposed, by contrast, would place increasing pressure on state agencies to *interfere* with individual liberty by removing children from their families out of fear that, otherwise, the State will be held liable for the resultant harms.[20] Whatever may be said of the wisdom of such an approach, it is a curious result to look for in the Due Process Clause. The essence of that provision is to *prevent* government intrusions on individual liberty. In enshrining that preference, it is not as if those who wrote the Bill of Rights did not realize that citizens could face great danger when left at liberty. Rather, they concluded that these privately created perils, unlike those that could be inflicted by the government, were not of constitutional concern. The approach that Petitioners urge in this case would turn this constitutional understanding on its head.

C. State Law Does Not Create A Liberty or Property Interest Applicable To This Case.

Petitioners also argue that the laws of Wisconsin grant him a constitutionally protected liberty or property interest in protection from harm. This position must be rejected for a number of independent reasons. To begin with, the argument has been raised for the first time in Petitioners' brief to this Court. It was not pled in the Complaint, argued to the Court of Appeals as a ground for reversing the District Court, or raised in the Petition for Certiorari. Given both the inherent uncertainty

[20] As characterized by Judge Posner in the opinion below, it would be inappropriate to force the federal courts into such an arena. "Balancing the rights of parents with those of their children is a task as difficult as it is delicate, and we doubt that it will be performed better under the eyes of federal courts administering constitutional law than by the state judicial and administrative authorities." Pet. App. at 44. To do otherwise would "place every state welfare department on the razor's edge, where if it terminates parental rights it is exposed to a § 1983 suit (as well as a state-law suit) by the parent and if it fails to terminate those rights it is exposed to a § 1983 suit by the child." *Id.* at 44-45.

of how Wisconsin will interpret its own law and the lack of any guidance on this issue from the lower federal courts, this Court should not now consider this putative basis for reversal. *See, e.g., Youngberg, supra,* 457 U.S. at 316 n.19 (citing cases).

Were this argument properly before the Court, it would have to be rejected nonetheless. While the contours of Petitioners' position are hard to discern from their brief, they appear to argue that Wisconsin law has created a liberty or property interest in state-provided protection against child abuse that must be accorded procedural protection under the Due Process Clause. Such a procedural claim, in any event, is the only one that can even be plausibly pertinent to a Section 1983 action because, generally speaking, ". . . illegality under the state's statute can neither add to nor subtract from [an action's] constitutional validity. Mere violation of a state statute does not infringe the federal Constitution." *Snowden v. Hughes,* 321 U.S. 1, 11 (1944); *see also Pennhurst State School and Hosp. v. Halderman,* 465 U.S. 89, 106 (1984) ("it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law").

Even properly stated, Petitioners' claim for a state-created liberty or property interest is insupportable for several reasons. To begin with, the Wisconsin legislature did not use the requisite language to signal its intent to create the kind of right that Petitioners now claim.[21]

[21] In fact the Wisconsin legislature has expressed its intent to the contrary. *See* § 48.981(4), Wis. Stats., which provides:

> IMMUNITY FROM LIABILITY. Any person or institution participating in good faith in the making of a report, conducting an investigation, ordering or taking of photographs or ordering or performing medical examinations of a child under this section [§ 48.981, Wis. Stats., the text of which is included in Petitioners' appendix] shall have immunity from any liability,

Because state law generally does *not* create constitutionally protected interests, *see, e.g., Olim v. Wakinekona*, 461 U.S. 238, 251 (1983), an expectation is subject to due process requirements only when state law uses "language of an unmistakably mandatory character" and, with equal particularity, enumerates "specific substantive predicates" to its deprivation. *Hewitt v. Helms, supra*, 459 U.S. at 471-72; *see also Ford v. Wainwright*, 477 U.S. 399, 429 (1986) (O'Connor, J., concurring).

The Wisconsin law relied on by Petitioners does not satisfy this stringent standard. It contains no requirement that child protection officials effectively intervene in all cases of suspected abuse, nor does it purport to afford specific substantive rights to suspected victims of abuse. At most, it requires only an investigation and subsequent report, such as were undertaken in this case. The filing of a "Petition to Terminate Parental Rights," in contrast, is left to the prosecutorial discretion of the District Attorney, City Attorney or Corporation Counsel. Moreover, such a Petition may be granted by the court only if the facts alleged have been proved by clear and convincing evidence. *See* §§ 48.13(3), 48.25, 48.31, Wis. Stats. These discretionary standards are plainly not sufficient to make out an enforceable due process interest.

Moreover, even if Wisconsin law were to have created a liberty or property interest applicable to this case, Petitioners wholly misunderstand the significance of such a conclusion. In that situation, Petitioners would be entitled at most to *procedural* due process protections, not substantive constitutional protections. As Justice Powell has explained, "[w]hile property interest are protected by procedural due process even though the

civil or criminal, that results by reason of the action. For the purpose of any proceeding, civil or criminal, the good faith of any person reporting under this section shall be presumed. The immunity provided under this subsection does not apply to liability for abusing or neglecting a child.

interest is derived from state law rather than the Constitution, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), substantive due process rights are created only by the Constitution." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring). In view of this critical distinction, it is necessary to look at the procedural due process afforded by Wisconsin in the current situation, a matter completely ignored by Petitioners.

It is undisputed that Wisconsin provides those in Petitioners' position with a common law tort remedy for damages. Such a post-deprivation remedy is sufficient to satisfy due process requirements. *See Ingraham, supra*, 430 U.S. at 674-82. Requiring a pre-deprivation hearing would obviously make no sense in this context. *See Parratt, supra*, 451 U.S. at 543-44; *Hudson v. Palmer*, 468 U.S. 517, 534 (1984). Thus, the Court has previously explained that there is no constitutional mandate for a prior hearing in the "many circumstances in which the state's conduct, if not adequately justified, would constitute a common law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the Fourteenth Amendment encompasses the same liberties as those protected by the common law." *Ingraham, supra*, 430 U.S. at 679 n.47 (quoting Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405, 431 (1977)). Since Wisconsin's tort law remedy satisfies this standard, it meets any procedural due process requirement that might obtain in the present case.[22]

[22] The fact that Wisconsin law places a $50,000 cap on recoveries in cases like the instant one, § 893.80(3), Wis. Stats., does not render this remedy constitutionally insufficient. This cap applies to all governmental liability in Wisconsin and provides a legitimate balance between individual compensation and the government's finan-

II. THE ALLEGED INACTION OF THE RESPONDENTS DOES NOT EVINCE THE STATE OF MIND NECESSARY TO INVOKE FOURTEENTH AMENDMENT PROTECTIONS.

As we have just shown, Petitioners have failed to establish any deprivation of a constitutional nature. Accordingly, as the decisions of the courts below both concluded, it is not necessary in this case to reach the issue of the "state of mind" of the Respondents. In the event that this Court does reach that issue, however, we believe that the alleged inaction of the Respondents does not evince the state of mind necessary to invoke the protections of the Fourteenth Amendment. On that basis as well, the judgment below must be affirmed.

This Court's most recent pronouncements on the state of mind requirement in the context of the Fourteenth Amendment are found in *Daniels* and *Davidson*. In *Daniels*, for example, the Court noted that the Due Process Clause concerns itself with governmental power that is "used for purposes of oppression" or where there is "abusive governmental powers." 474 U.S. at 331-32. It therefore emphasized that historically the Due Process Clause has been applied to "*deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Id.* at 331 (emphasis in original).

---

cial concerns. *See Archie, supra*, 847 F.2d at 1219 ("[a] higher limit on recoveries would induce the government to take more care, but it might also induce it to cut back on rescue services, helping [plaintiff's] heirs at the expense of those in need in the future. The Constitution does not require the state to hew to the best balance between effective care and expensive care—even if we knew what the best balance is. Dissatisfaction with the outcome of such a political choice is not a sufficient ground for declaring the structure unconstitutional."). *See generally Daniels, supra*, 106 S. Ct. at 680 (Stevens, J., concurring) ("Those aspects of a State's tort regime that defeat recovery are not constitutionally invalid, so long as there is no fundamental unfairness in their operation.").

Negligence in whatever form, whether slight, gross or denominated as "recklessness," does not amount to conduct that is "deliberate." Nor does it rise to conduct "used for the purpose of oppression." The government simply cannot attempt to oppress without an intent to do so—especially in a "failure to protect" situation, where it is necessary to distinguish between a decision not to devote limited resources to a particular task, on the one hand, and a decision to oppress particular individuals, on the other. Moreover, in this case, this difficult assessment of intent must also be made in a context where a child's alleged "right to be protected" needs to be balanced against the directly competing constitutional interests of his parents.[23]

In view of these considerations, we believe that the "deliberate indifference" test is the appropriate intent standard by which to measure a constitutional claim in the present circumstances. To trigger the protections of the Fourteenth Amendment, any failure to act must be based on a state of mind such that the actor can fairly be said to have deliberately and purposefully disregarded the constitutionally protected rights of another. Only that kind of conscious indifference to the rights of another can be fairly said to equate itself with conduct that is employed "as an instrument of oppression" or that amounts to "abusive governmental conduct." *See Davidson, supra*, 474 U.S. at 348. Indeed, the Court has already adopted this standard under the Eighth Amendment in cases involving the denial of medical care to prisoners. *See Estelle, supra.*

---

[23] The Court has previously recognized a parent's "commanding" interest in maintaining his or her parental status, including the "companionship, care, custody and management of his or her children." *See Santosky v. Kramer*, 455 U.S. 745, 758-59 (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) and *Stanley, supra*, 405 U.S. at 651.

To predicate due process protections on a distinction as artificial as that between negligence and "gross" negligence (or "recklessness")—as Petitioners would do—would be to overrule *Daniels* and *Davidson sub silentio*. The line between these varying standards is simply too imprecise to provide any meaningful constitutional guidance, especially in a case predicated on governmental inaciton.[24] It is common knowledge that plaintiffs in such cases routinely plead that the failure to act was either negligent, grossly negligent or reckless, the latter standards supposedly reflecting greater degrees of inattention. But none of these standards would require a showing of purposeful or deliberate governmental action, which is the touchstone of *Daniels* and *Davidson*. *See also Parratt*, *supra*, 451 U.S. at 548 (Powell, J., concurring).

In the present case, there is no basis for suggesting that Respondents acted with deliberate indifference toward the constitutional rights of Petitioner.[25] On the

[24] *See, e.g.*, Prosser and Keeton, *The Law of Torts* § 34 (5th Ed. 1984) for a discussion of the vague and impracticable distinction between negligence and "gross" negligence. *See also Archie*, *supra*, 847 F.2d at 1219, where the court, addressing this identical issue, notes:

> Gross negligence blends into negligence; there is an indistinct and unusually invisible line between benefits exceeding the cost of precautions (negligence) and benefits substantially exceeding the costs (gross negligence). The malleable quality of these terms has produced scoffing among many, who see gross negligence as simply negligence 'with the addition of a vituperative epithet.' A line that cannot be policed is not a line worth drawing in constitutional law.

(citations omitted).

[25] The fact that the courts below did not make a finding concerning deliberate indifference does not preclude this Court from deciding that, drawing all inferences in favor of Petitioners, Respondents in this case did not act with this level of intent. *See Estelle*, *supra* (announcing the deliberate indifference standard for certain Eighth Amendment violations and finding without remand that it was not met).

contrary, they continued to monitor his situation for over a year. They clearly considered the matter to be serious but concluded, based on the exercise of their professional judgment, that there was insufficient evidence to demonstrate "child abuse" under the "clear and convincing" standard, which is mandated by both Wisconsin law and the Constitution before parental rights may be terminated. *Compare* § 48.31, Wis. Stats., *with Santosky v. Kramer*, 455 U.S. 745, 769 (1982). Indeed, Respondents were not only *not* indifferent to Petitioner's plight, they also acted with sensitivity to the parental rights at stake here—*i.e.*, "to conceive and raise one's children[, which] have been deemed 'essential' 'basic civil rights of man,' and '[r]rights far more precious than property rights.'" *Stanley*, *supra*, 405 U.S. at 657 (citations omitted).[26]

It cannot be gainsaid that Respondents operate in a highly charged human services area. Each day they are forced to balance the needs and interests of children against those of their parents. *Cf. McNamara v. San Diego Dep't of Social Services*, *pending*, No. 87-5840. Aside from having to make enormously difficult decisions, Respondents also face an equally treacherous task in attempting to secure important information. Although Petitioners repeatedly criticize them for not uncovering more information, the fact is that, unless there is sufficient evidence to institute formal proceedings against a particular family, Respondents' efforts all depend on the voluntary cooperation of that family. Thus, while it is easy to argue that they should have insisted that Mr. DeShaney provide them with certain information or that

[26] The natural hesitancy of social workers to terminate parental rights or seek other similarly intrusive measures is plainly not, in itself, an impulse to be condemned, especially in light of the fact that premature termination of parental rights would be separately actionable under § 1983. *See, e.g., Hodorowsky v. Ray*, 844 F.2d 1210 (5th Cir. 1988).

he do certain things, Respondents had to walk a delicate line. If they had pushed too hard, further access to the DeShaney family could have been cut off altogether. Under such circumstances, Respondents cannot be found to have been deliberately indifferent to Petitioners' rights.[27]

It is helpful to point out in this regard that the actions for which Respondents are being criticized are plainly less culpable than those found insufficient to establish liability in *Davidson*, *supra*. In that case, a prisoner had advised the Assistant Superintendent in writing of a threat against him. The official sent the note to a guard, but no action was taken by either, and the prisoner subsequently suffered serious injury when the threat was carried out. On these facts the Court concluded that, "[f]ar from abusing governmental power, or employing it as an instrument of oppression, Respondent Cannon mistakenly believed that the situation was not particularly serious and Respondent James simply forgot about the note." 474 U.S. at 348. Certainly nothing worse can be said of Respondents' intentions in this case.

For good reason, this Court in fashioning rules for constitutional liability has always been "hesitan[t] to critique in hindsight" the difficult decisions of officials who must weigh the kind of "competing obligations" that Respondents faced in this case. *Whitley v. Albers*, 475 U.S. 312, 320 (1986). If mistakes do occur in such circumstances, they are the province of State tort law and simply do not rise to the level of a constitutional violation. Accordingly, Respondents are entitled to judgment as a matter of law because, on the facts as alleged, they cannot be found to have had the requisite intent for a due process violation.

---

[27] Indeed, Respondents proffered expert testimony to the effect that their actions were proper and in accordance with recognized professional standards. (J.A. at 154-55.)

III. SINCE NO GOVERNMENTAL POLICY OR CUSTOM INFLICTED THE INJURIES COMPLAINED OF, PETITIONERS HAVE NO SECTION 1983 CLAIM AGAINST THE WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES OR WINNEBAGO COUNTY.

If, despite the hurdles of state action and intent, Section 1983 liability may still lie in this case, an issue remains as to whether any policy of Winnebago County or its Department of Social Services caused the harms alleged by Petitioners. Ironically, although a governmental entity may not be held liable under Section 1983 in the absence of such a "policy or custom," *Monell*, *supra*, Petitioners recognize that in this case, the government's policy was in direct opposition to the harms alleged. As their brief explicitly notes, "the state and county had expressed *specific policies and intentions to seek out and prevent child abuse.*" Br. at 19 (citing to County policies) (emphasis supplied). For this reason alone, the claims against the County and its agency were properly dismissed. *See, e.g., Dodson*, *supra*, 454 U.S. at 327.

Even without this directly contrary policy, the County and the Department could still not be held liable here. In the wake of *Monell*, the Court has recognized that "some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter." *Tuttle*, *supra*, 471 U.S. at 823. The Court has therefore held that "[m]unicipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur*, *supra*, 475 U.S. at 481. The "fact that a particular official—even a policymaking official—has discretion in the exercise of a particular function does not, without more, give rise to municipal liability based on an exercise of that discretion." *Id.* at 481-82. Municipal liability at-

taches under § 1983 only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 483.

Under these principles, none of the allegations in Petitioners' Complaint suffice to state a violation of Section 1983 by either the County or the Department. Petitioners alleged only that the County and Department followed a "policy, custom and practice" of delegating to Ann Kemmeter and her immediate supervisor, Cheryl Stelse, the "authority, power, right and responsibility to make decisions and take actions for and on behalf of the said public entities." (J.A. 10.) Petitioners also attempted to attribute the acts of the individual social workers to the County and Department by alleging that they "authorized, approved, ratified, condoned and adopted the decisions, actions and omissions of the individual defendants" and that said "policies, decisions, actions and omissions" violated the Petitioners' civil rights. (J.A. 10-11.)

These wholly conclusory allegations are legally insufficient to implicate the County or the Department in this lawsuit.[28] As a plurality of the Court recognized last Term in *Praprotnik*, *supra*, "[s]imply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy." 108 S. Ct. at 927. Additionally, "the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation

[28] Respondents moved for dismissal of the Winnebago County Department of Social Services and Winnebago County in the District Court on the basis that Petitioners had failed to allege a sufficient "policy or custom." The pleadings did not comply with *Strauss v. City of Chicago*, 760 F.2d 765 (7th Cir. 1985), which held that mere allegations or legal conclusions wholly devoid of facts required a dismissal of a *Monell* "policy" claim. This aspect of Respondents' Motion was not addressed by the District Court.

of policymaking authority." *Ibid.* In short, neither governmental entity can be held liable in this case because of its failure to prevent a discretionary decision made by one of the large number of front-line social workers in its employ.

The plurality in *Praprotnik* also emphasized that "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Id.* at 925. In that regard, § 46.22, Wisc. Stats., which is applicable to Winnebago County, provides that the County Board of Welfare "shall be a policymaking body determining the broad outlines and principles governing the functions, duties and powers assigned to [the Department of Social Services]." The Department itself is charged under the statute with the "administ[ration of] child welfare services." Nowhere is any policy making authority given to individual social workers under state law. For this reason as well, the highly discretionary decisions of these employees, which is all that is at issue in this case, cannot provide the basis for Section 1983 liability for either the County or the Department.

IV. THE CLAIMS AGAINST THE INDIVIDUAL RESPONDENTS MUST BE DISMISSED BECAUSE THEY ARE ENTITLED TO QUALIFIED IMMUNITY.

Yet another impediment to Section 1983 liability prevents the individual social workers from being held responsible for monetary damages in this case. Because these individuals acted with the requisite good faith that protects them from personal liability for the official actions that they either took or declined to take, they are entitled to qualified immunity.

Qualified immunity is afforded to public officials as an accommodation to the "conflicting concerns" of, on one hand, public officials seeking freedom from personal monetary liability and harrasing litigation and, on the

other hand, injured persons seeking redress for the abuse of official power. *Anderson v. Creighton*, 107 S. Ct. 3034, 3038 (1987). This accommodation provides public officials performing discretionary functions with protection against liability for damages as long as they acted with "objective legal reasonableness," assessed in the light of "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow, supra*, 457 U.S. at 818. The Court has also made clear that an individual does not forfeit his immunity even if his conduct might violate clearly established state law requirements so long as the conduct does not run afoul of clearly established constitutional principles. *Davis v. Scherer*, 468 U.S. 183, 190 (1984).

The individual respondents in this case acted in good faith. As the course of events demonstrates, they continued to provide voluntary family services to the DeShaney family for a period of more than a year after their initial contact with Joshua DeShaney. Far from indicating bad faith, their efforts reflected particular sensitivity to the only constitutional rights that had at the time been clearly established—*i.e.*, those of Petitioner's father. *See, e.g., Stanley, supra*; *Santosky, supra*. Indeed, both courts below ruled that the actions in question did not amount to a constitutional violation, thereby confirming Respondents' objective reasonableness at the time they acted. *See also* n.17 *supra* (citing other cases finding no violation). Thus, even if the Court were inclined to fashion a new rule of constitutional liability for a State's failure to intervene effectively in a child abuse case, the individual Respondents in this case should not be held liable for activities that they engaged in several years ago, when such a rule was plainly not foreseeable.[29]

[29] Since Respondents clearly satisfy the qualified immunity standard, there is no need to decide here whether officials like Respondents, who are called upon to make determinations that bear upon the proposed termination (or non-termination) of parental rights, are entitled to absolute immunity as are prosecutors. *Compare Meyers v. Contra Costa County Department of Social Services*, 812 F.2d 1154 (9th Cir.) (absolute immunity), *cert. denied*, 108 S. Ct. 98 (1987); *Malachowski v. City of Keene*, 787 F.2d 704 (1st Cir.) (same), *cert. denied*, 107 S. Ct. 107 (1986); *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1986) (same), *with Robinson v. Via*, 821 F.2d 913 (2d Cir. 1987) (qualified immunity); *Hodorowski v. Ray, supra* (same).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Of Counsel:
JOEL I. KLEIN
DAVID A. BONO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

MARK J. MINGO *
WAYNE M. YANKALA
SIMARSKI & STACK, LTD.
611 North Broadway
Milwaukee, WI 53202
(414) 273-7400

* *Counsel of Record*

Supreme Court, U.S.
FILED
SEP 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-154

In The
Supreme Court of the United States
October Term, 1987

JOSHUA DeSHANEY, a Minor, by his Guardian ad litem, and MELODY DeSHANEY,

Petitioners,

vs.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES; WINNEBAGO COUNTY; ANN KEMMETER and CHERYL STELSE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

Donald J. Sullivan
Counsel of Record
Law Offices of Donald J. Sullivan, P.C.
1815 Evans Avenue
Cheyenne, WY 82001
(307) 634-0112

Curry First
Legal Aid Society of Milwaukee, Inc.
1204 West Wisconsin Ave.
Milwaukee, WI 53233
Attorneys for Petitioners

September, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Argument:

I: Introduction 1

II: The Importance of a Child's Safety and the Intimate Relationship Between an Endangered Child and a Child Protection Agency 3

III: The Argument of Liability Only for "Active" Abuses of Power Should be Rejected 5

A) The Caselaw Does Not Support the Argument 5

B) The Legislative History § 1983 Negates The "Action/Inaction" Dichotomy Claimed By Respondents 8

IV: Wisconsin Child Protection Statutes in Chapter 48 Provide Additional Support for the Existence of a Liberty or Property Interest 9

V: The Defense Of Qualified Immunity Is Not Before This Court 11

VI: Respondents' Position Would Graft An Unnecessary "State of Mind" Requirement Onto Due Process Protections 12

VII: The "Razor's Edge" Argument Is Misplaced And Does Not Fit The Reality Of Constitutional Child-Protection 13

Conclusion 16

TABLE OF AUTHORITIES

Page

CASES:

Balistreri v. Pacifica Police Department, — F.2d —, No. 87-1969 (9th Cir. Aug. 23, 1988) 3

Board of Regents v. Roth, 408 U.S. 564 (1972) 9

Daniels v. Williams, 474 U.S. 327 (1986) 5, 7, 12, 13, 14

Davidson v. Cannon, 474 U.S. 344 (1986) 2, 12, 13, 14

Dewey v. Des Moines, 173 U.S. 193 (1899) 9

DiMarzo v. Cahill, 575 F.2d 15 (1st Cir. 1978), *cert. denied*, 439 U.S. 927 6

Doe v. New York Department of Social Services, 649 F.2d 134 (2nd Cir. 1981) 11

Estate of Connor v. O'Connor, 846 F.2d 1205 (9th Cir. 1988) 13

Felder v. Casey, 108 S.Ct. 2302 (1988) 6

Hewitt v. Helms, 459 U.S. 460 (1983) 3, 4

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 2

L.J. by and through Darr v. Masinga, 838 F.2d 118 (4th Cir. 1988) 12

Malley v. Briggs, 475 U.S. 335 (1986) 11

Monell v. Department of Social Services, 436 U.S. 658 (1978) 8

Monroe v. Pape, 365 U.S. 167 (1961) 6, 12

Palmore v. Sidoti, 466 U.S. 429 (1984) 3

Parratt v. Taylor, 451 U.S. 527 ..... 2, 12

Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) 1, 3, 5, 9, 10, 11

TABLE OF AUTHORITIES—Continued

Page

Turner v. U.S., 248 U.S. 354 (1919) 1

White v. Rochford, 592 F.2d 381 (7th Cir. 1979) 11

Youngberg v. Romeo, 457 U.S. 307 (1982) 3, 13

CONSTITUTIONAL AND STATUTORY AUTHORITIES:

U.S. Const. amend. XIV ..... *passim*

42 U.S.C. § 1983 ..... *passim*

Wis.Stat.Ann.Chap.48 (West 1983)

Sec. 48.01(1)(b) 10

Sec. 48.01(1)(e) 10

Sec. 48.01(2) 10

Sec. 48.981 10

Sec. 48.981(3)(c) 10

Sec. 48.981(3)(c)5 10

MISCELLANEOUS:

Cole, *Religious Confidentiality and the Reporting of Child Abuse: A Statutory and a Constitutional Analysis*, 21 Col.J. of L. & S.Prob. 1 (1987) 14

Keynes, *The Fourteenth Amendment, 42 U.S.C. § 1983, and State Inaction: Did The Authors of The Enforcement Act of 1871 Intend Civil Liability for The States' Failure to Protect Individual Rights*, (unpublished paper, Penn State Univ., 1988) 8

Myers, *The Legal Response to Child Abuse: In the Best Interests of Children?*, 24 J.Fam.L. 149 (1985-86) 14

TABLE OF AUTHORITIES—Continued

Page

Posner, *Wealth Maximization Revisited,* 2 Notre Dame J.L. Ethics & Pub. Pol'y 85 (1985) ("Wealth maximization as ethically attractive norm for social and political choices") 13

Thomas, *Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspective,* 50 N.C.L. Rev. 293 (1972) 14

Wald, *Children's Rights: A Framework for Analysis,* 12 U.Cal.D.L.Rev. 255-56 (1979) 3

ARGUMENT

I: Introduction

Respondents and their supporting amici focus their attention on broad general discussions about a general governmental duty to protect the public at large; then, having raised this strawman, proceed to destroy it. Petitioners urge the Court, however, scrupulously to focus on the exquisitely narrow issue presented by the facts of this case. While § 1983 cases in the protection area fall into a variety of categories, none is as narrow and as constitutionally compelling as this specific case, involving the protection of an infant from physical harm under circumstances where the County, in addition to having actual knowledge and a statutory duty, has actively undertaken his protection, and done so in a reckless and indifferent manner.[1]

The decisions which have found a constitutional deprivation, such as *Taylor v. Ledbetter,* 818 F.2d 791 (11th Cir. 1987) (en banc) are predicated not simply on the "special or *other* relationship" analysis but, more importantly, the constitutional analysis involved when the state actively undertakes to protect a child from physical violence. This constitutional analysis recognizes the total vulnerability of children in our society and the primacy any organized society places on protecting helpless children. Respondents' assertion, Resp. Br. at 12, that " . . . there is no affirmative constitutional obligation on

---

[1]Thus, cases cited by Respondents, such as *Turner v. United States,* 248 U.S. 354 (1919), dealing with a rejected Court of Claims petition for monetary compensation for property damaged by mob violence, stand on an entirely different footing.

the government to provide protective services" is factually irrelevant to this limited setting. This case concerns only constitutional liability in a child protection setting under specific facts where government defendants actively participated, with egregious failures, in such protection. Accordingly, this Court should resist Respondents' attempts to create a larger issue not truly present and the attempts by amici to speculate about the meaning of any decision in this particularized case in other societal settings.[2]

Petitioners agree with Respondents' brief (p. 14) that this case concerns the Due Process Clause and the framers' intention to prohibit "real *abuses* by state officials in the exercise of governmental power." *Parratt v. Taylor*, 451 U.S. 527, 549 (Powell, J., concurring) (emphasis in original). Accordingly, it appears the parties are in agreement that the specific facts in this case address themselves to the issue of whether there were real abuses[3]

---

[2]In *Lassiter v. Department of Social Services*, 452 U.S. 18, 32 (1981), this Court in a family law due process setting directed trial judges to make such analysis by examining the "particular situation." This Court counselled against a generalized approach to resolving that due process issue in future settings.

[3]The Court of Appeals decision in this case found Respondent caseworker Ann Kemmiter reckless when she "inexplicably failed to act on mounting, and eventually overwhelming, evidence that Joshua was in great peril from his father." Pet. App. 44. Judge Posner for that same Court assumed that Respondents' failure to protect Joshua was sufficiently aggravated to escape the bar established by this court in *Daniels v. Williams*, 474 U.S. 327 (1986) and *Davidson v. Cannon*, 474 U.S. 344 (1986). Pet. App. 41.

by the Respondents in their exercise of governmental powers under the Wisconsin child protection statutes and thus a violation of the Due Process Clause.

II: The Importance of a Child's Safety and the Intimate Relationship Between an Endangered Child and a Child Protection Agency

Petitioners emphasize, Pet. Br. at 11-24, the constitutional considerations certain Courts of Appeals have undertaken respecting "special custodial *or other relationships* created *or assumed* by the State in respect to particular persons." *Taylor v. Ledbetter*, 818 F.2d 791, 798 (11th Cir. 1987) (en banc), pet. for cert. filed Dkt. No. 87-521, 56 U.S.L.W. 3290 (U.S. Sept. 25, 1987) (emphasis supplied).[4] A theme running through the constitutional analysis in these cases is the recognition that young children are the most vulnerable persons in any society. "The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).[5] The Respondents' reaction to such state child protection

---

[4]Respondents nowhere in their 39 page brief mention or discuss this 1987 en banc circuit opinion. This Court should also be informed that last month—subsequent to the filing of Respondents' brief—the Ninth Circuit followed *Taylor* in *Balistreri v. Pacifica Police Department*, — F.2d —, No. 87-1969 (9th Cir. Aug. 23, 1988).

[5]A state's power vis a vis vulnerable children, whether characterized as a State's police power or parens patriae, is based primarily on the presumption that younger children lack the mental capacity and maturity to protect themselves. *See Wald, Children's Rights: A Framework for Analysis*, 12 U.Cal.D.L.Rev. 255-56, 262-63, 266-70, 273-74 (1979).

systems is set forth in their brief, Resp. Br. at 21. Quoting *Hewitt v. Helms,* 459 U.S. 460 (1983),[6] Respondents assert they should not be penalized for such a "desirable experiment" when child protection services undertaken are "imperfect." Respondents miss the issue; child protection is not merely "desirable," nor is it an experiment.[7] Child protection, under state statutes and the Constitution, is a reaction to "the demands of an organized society." *Youngberg v. Romeo,* 457 U.S. 307, 320 (1982). As such, courts must balance the liberty interests of parents to continued custody against the child's vulnerability and right to bodily integrity.[8]

In arguing against the invocation of the child's due process right in this context, amici suggest policy reasons for retrenchment. The City Management amici, whose members include state, county and municipal goverments, state at pp. 14-17 affirmatively that family law matters should be left to the states to resolve. Amici, following the attempt by Respondents, seek to expand and generalize the issues in this case by discussing generally family relationships and the need for family and juvenile courts. Whether the due process clause is substantively implicated in a physical child abuse situation where the government has, over two years, actively exercised power, knows the child is being abused, knows it is his sole protector, and believes he will be killed, is again the narrow issue facing

---

[6]This Court's *Hewitt* decision had nothing to do with children, the potential for physical harm, or an individual's need for physical protection.

[7]See footnote 15 *infra*.

[8]*Infra,* 13-15, for further discussion of this constitutional due process balancing.

the Court in this case. It takes no particular expertise to determine that abundant direct evidence of multiple acts of physical abuse warrants due process. One need only examine the child abuse due process cases from the lower federal courts to ascertain that this aspect of the analysis is not difficult. Indeed, in this case Judge Posner articulated no difficulty in concluding the facts were sufficiently aggravated to escape the bar of *Daniels* when he examined the "mounting, and eventually overwhelming, evidence that Joshua was in great peril from his father." Pet. App. 44.

The Court in *Ledbetter* so analyzed the 14th Amendment in the child protection context:

> "The fourteenth amendment, like the eighth amendment, 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' With contemporary society's outrage at the exposure of defenseless children to gross mistreatment and abuse, it is time that the law give to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds." 818 F.2d at 797 (citation omitted).

III: The Argument of Liability Only for "Active" Abuses of Power Should Be Rejected

A) The Caselaw Does Not Support the Argument

Respondents attach significance to their "actively inflicted" constitutional characterization. Resp. Br. at 15-23. For example, "This active infliction requirement—com-

mon to both state action under the Fourteenth Amendment and causation under Section 1983—is especially important in a case such as this, where government services have been provided but are argued to have been inadequate." Resp. Br. at 21. Respondents ignore the fact that decisions from this Court under § 1983, aside from active infliction of injury, have frequently noted that neglect or misuse or failure to act may constitute an unconstitutional abuse of power.

> It is abundantly clear that one reason the legislation [§ 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, *neglect,* intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunity guaranteed by the Fourteenth Amendment might be denied by the state agencies. *Monroe v. Pape,* 365 U.S. 167, 180 (1961) (emphasis added).

The First Circuit in *DiMarzo v. Cahill,* 575 F.2d 15, 18 n. 3 (1st Cir. 1978), *cert. denied,* 439 U.S. 927, similarly interpreted § 1983 based on *Monroe*:

> [T]he Civil Rights Acts of 1871 were intended to safeguard constitutional rights which state authorities might deny by neglecting to enforce state statutes as well as by more affirmative action . . . Failure to act where there is a duty to act can give rise to an actionable claim under section 1983.[9]

This year in *Felder v. Casey,* 108 S.Ct. 2302, 2307 (1988), this Court reaffirmed § 1983 and noted again

---

[9]*Monroe v. Pape, supra,* also analyzed sec. 1983 as a Congressional intent to enforce the Fourteenth Amendment against state officials "whether they act in accordance with their authority or misuse it." *Id.* at 172.

> that it provides " 'a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the nation,' and is to be accorded 'a sweep as broad as its language.' " (citations omitted.)

Respondents resist the very narrow issue and facts in this specific case; the constitutional deprivation due process issue here revolves around the protection of children from violence, and that issue alone is present. For example, the City Management amici (p. 5) are simply wrong in asserting, "there is no principled basis for distinguishing child welfare services from other protective services."[10] These assertions by Respondents and amici are too sweeping and again fail to recognize that the core concern of protecting children from physical violence constitutes a paramount concern. The fact that this Court has granted respect to parents in the realm of their decision making for their children vis a vis medical care, education, and the like is to be clearly distinguished from issues in the realm of parents physically abusing their vulnerable children. If it is true that under *Daniels,* 474 U.S. at 329-332, abuse of power is the core value of the Due Process Clause, then a State abusing its power to protect such vulnerable children strikes at that core value.

---

[10]The same amici at p. 2 throw down the gauntlet, asserting a finding of liability in this case would force federal courts to address child abuse and an issue that is the "recognized province of state and local governments." Wrong. The same alarm was sounded when the unconstitutional use of law enforcement force—an abuse of power—first surfaced in federal courts over two decades ago. In the same manner, the amicus brief in support of Respondents by the State of New York, et al., asserts at p. 13 there should be special and required deference to parental decision making in this area.

B) The Legislative Hostory of § 1983 Negates The "Action/Inaction" Dichotomy Claimed By Respondents.

Respondents assume and then assert as fact that the 14th Amendment and its legislative enforcement in § 1983 were intended solely to address instances of "active infliction" by states. They refer, Resp. Br. at 18, and notes 12 and 14, to this Court's discussion of the debates on the predecessor to § 1983 in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), and the Solicitor General's Brief (p. 12) makes a similar suggestion. Neither, however, addresses the legislative debate directly.

Respondents' historical assertion is erroneous, and is refuted by a conscientious examination of the legislative history. Petitioners submit with this Reply Brief, as a Special Appendix[11], a scholarly review of the Congressional debates on the original H.R. 320 (now, § 1983) in the 42nd Congress, written by Professor Edward Keynes of Penn State University (unpublished, 1988) entitled "The Fourteenth Amendment, 42 U.S.C. § 1983, and State Inaction: Did The Authors of The Enforcement Act of 1871 Intend Civil Liability for the States' Failure to Protect Individual Rights." This appears to be the first scholarly examination of the original records in the context of the "action vs. omission" question. As the paper and its examination of the Congressional debate amply demonstrate, both the proponents and the op-

[11]For clarity, this Special Appendix is page-numbered App. 15, ff., to preclude confusion with the Wisconsin statutory material appended to Petitioners' initial Brief at pages App. 1 through App. 14.

ponents of H.R. 320 recognized, *and consciously intended*, that redress would be afforded not merely for "bad acts" but for the *failure to enforce* constitutional rights. Indeed, the *omissions* of constitutional protection commonly occuring during Reconstruction were a *primary* aim of the bill, not a mere side issue.

The bill's opponents argued, as do Respondents here, that the federal government's authority was limited to preventing the states from actively depriving persons of life, liberty and property without due process of law. (Special Appendix, at App. 31). This view was rejected by the Congress (Special Appendix, at App. 22-41) and should be rejected by this Court.

IV: Wisconsin Child Protection Statutes in Chapter 48 Provide Additional Support for the Existence of a Liberty or Property Interest

Respondents argue the *Board of Regents v. Roth*, 408 U.S. 564 (1972) entitlement issue is not properly before this Court. Resp. Br. at 26-29. Factually, however, Petitioners' Complaint (para. 46, J.A. 11) specifically referenced the provisions of Sec. 48.891, Wis. Stats. 1981-1982. Further, respecting the references to state law by the Court below and the manner in which this issue factually and legally flows from substantive due process, the "mere enlargement" rule should logically permit resolution. *See* ***Dewey v. Des Moines***, 173 U.S. 193, 198 (1899).

Petitioners relied heavily in their initial Brief on the Eleventh Circuit's en banc decision in *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987). (Strikingly, Respondents' Brief omits any reference to *Taylor* whatever). It is

significant to note that the *Taylor* court found the *Roth* argument meritorious. The court en banc carefully scrutinized a Georgia child protection statutory scheme and noted the mandates present therein and the affirmative duties placed on government officials to protect children. In this case, Wisconsin Statutes are similarly mandatory. For example, beyond general legislative aims to provide for the care and protection of children, Sec. 48.01(1)(b); to respond to children's need for care and treatment, Sec. 48.01(1)(e); providing for liberal construction to effect its objectives, and for the best interests of the child to be of paramount consideration, Sec. 48.01(2), the statute specifically mandates that social workers and others with reasonable cause to suspect child abuse *shall* report such, Sec. 48.981(2); persons required to report, such as social workers, *shall* immediately contact designated officials, Sec. 48.981(3); County DSS upon receiving a report *shall* commence an appropriate and thorough investigation within twenty-four hours, Sec. 48.981(3)(c); and a DSS investigator having grounds *shall* place the child in protective custody, Sec. 48.891(3)(c)(5). These acts are not elective, but mandatory; the mandate goes not to how "perfectly" they are carried out, but to the stark obligation to perform them. In this case, factually, these unequivocal mandates were ignored, and ignored repeatedly. It is not simply that they were done poorly; rather, they were not done at all, and were omitted without excuse or sense.

The Wisconsin child protection statutes manifest a directive that meaningful, effective child protection *shall* be carried out; that responsible reports of child abuse

shall be investigated, appropriately, thoroughly and timely; and that evidence of endangerment *shall* be acted on, effectively. The State articulated the mandatory aspects of a liberty interest which is protected by the 14th Amendment; the child's right to this protective service exists, and substantive due process compels protection of that right. *Taylor v. Ledbetter*, 818 F.2d at 798-800.

V: The Defense of Qualified Immunity Is Not Before This Court

Respondents argue, Resp. Br. at 37-38, for this Court to review and then dismiss this action based upon the claim of a qualified immunity they say is available to the individual Respondents.[12] This argument was not raised by the Respondents before the district court or the Seventh Circuit.

Any examination of this issue, although now premature, would reveal the fact that a special or other noncustodial relationship had been articulated as a due process constitutional right precipitant in the Seventh Circuit years earlier. *See White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). In the child protection context predating the facts herein, *see Doe v. New York Department of Social Services*, 649 F.2d 134 (2nd Cir. 1981).

---

[12]Amici City Management in its Brief at pp. 25-26 takes a comparable position. The amicus brief of the six states takes a contrary position (pp. 6-11), asserting that such individual respondents have absolute immunity from liability for money damages. This claim is refuted by this Court's analysis in *Malley v. Brigges*, 475 U.S. 335, 342-43 (1986).

The position asserted by Respondents is laid to rest, moreover, by the recent analysis by Chief Judge Winter for the Fourth Circuit in *L.J. by and through Darr v. Masinga,* 838 F.2d 118, 122 (4th Cir. 1988).

VI: Respondents' Position Would Graft An Unnecessary "State of Mind" Requirement Onto Due Process Protections

Respondents disingenuously seek to graft another requirement, a state of mind requirement, onto § 1983 liability. Resp. Br. at 30-34. These efforts were rejected by the court below, for good reason, as it recognized the recklessness employed by Respondents and particularly Respondent Kemmeter. The court accepted that Respondents' failures were sufficiently egregious to escape the bar of *Daniels,* 474 U.S. 327 (1986) and *Davidson,* 474 U.S. 344 (1986).

Respondents' decision to focus on a "state of mind" requirement seems especially inappropriate in view of Respondent Kemmeter's comment that "I just knew the phone would ring some day, and Joshua would be dead." J.A. 107-108.

This Court has not retreated from its 1961 holding in *Monroe v. Pape,* 365 U.S. 167, 180, that § 1983, unlike 18 U.S.C. 242, has no state of mind requirement. *See Parratt*

v. Taylor, 451 U.S. 527, 534-535 (1981). In *Daniels, supra,* the Court made clear that it had not abandoned its view: "We adhere to that conclusion." 474 U.S. at 330.

The Ninth Circuit has recently scrutinized *Daniels* and *Davidson* to determine whether they impose scienter or other culpability requirements superceding the balancing standard of review appropriate under *Youngberg v. Romeo,* 457 U.S. 307 (1982). In *Estate of Connor v. O'Connor,* 846 F.2d 1205 (9th Cir. 1988), the court held that *Youngberg* had not been vitiated by *Daniels or Davidson. See Taylor v. Ledbetter, supra.*

VII: The "Razor's Edge" Argument Is Misplaced and Does Not Fit the Reality of Constitutional Child-Protection

The Court below asserted that acknowledging liability in even such aggravated circumstances as those present here would place welfare departments "on the razor's edge." Pet. App. at 44-45.[13] Respondents make a similar argument, Resp. Br. at 8, 26,[14] and suggest a flood of liti-

---

[13]*See* Posner, *Wealth Maximization Revisited,* 2 Notre Dame J.L. Ethics & Pub. Pol'y 85 (1985) ("Wealth maximization as ethically attractive norm for social and political choices.")

[14]Similarly, the Solicitor General in his amicus brief at p. 13 n.4 imagines the "enormous economic consequences" flowing from the due process right asserted by petitioners herein. The City Management amicus brief at p. 19 imagines that the financial consequences of liability in this case could substantially impair if not destroy foster care service in many states. The

(Continued on following page)

gation would follow a recognition by this Court of duty and liability in this case.

This claim is unwarranted legally and factually. Factually it assumes that the only two alternatives in existence are to remove the child and terminate all parental rights or abandon the child to the fury of the abusive parent, ignoring the vast array of less-intrusive intermediate options available. Legally, it forgets that under *Daniels* and *Davidson, supra,* there can be *no* liability to anyone, parent or child, for negligence. Under those cases no liability can exist anywhere in the broad middle range of "which way shall we go in this case" situations. Far from being in a "damned-if-we-do, damned-if-we-don't" dilemma, the caseworker and the department are already afforded strong, broad protection, so that only a termination decision prompted by spite and malice, or a "refusal to protect" decision spawned by the most egregious neglect

---

(Continued from previous page)

amicus brief from the six states as amici hypothesized that liability would unfairly burden social service professionals with the potential for liability and do so in an area of the law where courts would, as a practical matter, be unable, through lack of confidence, to arrive at proper decisions. As to this latter argument, the states amici, pp. 13-15, cite, for example, the fact that no consensus exists in the educational field on the appropriate way to educate children. This latter argument is sophistry, as we are focusing on a very narrow and clear issue, viz. the prevention of physical violence against children. Although it takes careful scrutiny when evidence is presented in a case like this, it requires no special judicial training to conclude, as did Judge Posner below, that the respondent caseworker exhibited recklessness "when Ann Kemmeter inexplicably failed to act on mounting, and eventually overwhelming, evidence that Joshua was in great peril from his father." Pet. App. at 44.

and indifference (such as are present in the facts of this case), can give rise to liability; *the entire middle range is free of liability, even where tragic results ensue.* The razor's edge literally does not exist.

If there is to be a balancing of the constitutional rights of endangered and abused children against parental rights (which have never been deemed to include a right to commit abuse upon a child), we should at a minimum recognize the extent of the problem and its effects. The reality is that children are increasingly facing violence at the hands of their parents and guardians.[15] Respondents here, and others in their position, have a critical responsibility to their young clients, and must recognize that this duty of protection is primary; their other duties, however worthy, are secondary.

This Court's recognition of Respondents' duty, and corresponding liability in extreme instances of refusal to protect children known to be abused, will strike an appropriate balance among arguably competing interests; to refuse that recognition in even the most extreme instance would leave the battered child and his rights entirely out of the equation.

—————o—————

---

[15]*See,* e.g., Myers, *The Legal Response to Child Abuse: In the Best Interests of Children?,* 24 J.Fam.L. 149, 164-169 (1985-86); Cole, *Religious Confidentiality and the Reporting of Child Abuse: A Statutory and a Constitutional Analysis,* 21 Col.J. of L. & S. Prob.1, 3-5 (1987); Thomas, *Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspective,* 50 N.C.L. Rev. 293 (1972).

CONCLUSION

A fair view of the constitutional rights of endangered children, shared by all of the appellate courts which have considered these questions except the court below, demonstrates that Joshua DeShaney enjoyed protected constitutional rights which were egregiously violated by Respondents.

The decision below should be reversed and the matter remanded for trial upon the merits of the case.

Respectfully submitted,

DONALD JAMES SULLIVAN, ESQ.
Counsel of Record
1815 Evans Avenue
Cheyenne, WY 82001

CURRY FIRST, ESQ.
Legal Aid Society of Milwaukee, Inc.
1204 W. Wisconsin Ave.
Milwaukee, WI 53233

Attorneys for Petitioners

THE FOURTEENTH AMENDMENT, 42 U.S.C. § 1983, AND STATE INACTION

Did The Authors of The Enforcement Act of 1871 Intend Civil Liability for The States' Failure to Protect Individual Rights*

Edward Keynes
Professor of Political Science

The Pennsylvania State University
University Park, Pennsylvania

September 5, 1988

In a series of decisions beginning with *Monroe v. Pape* (1961),[1] the Supreme Court has addressed the vexing problem of the states' liability for civil damages for violations of individuals' fourteenth-amendments rights.[2]

---

* The author is indebted to Mr. Jack Sulzer, Librarian, Government Documents Section, The Pennsylvania State University Libraries, University Park, Pennsylvania, and Mr. Chris Wright, Librarian, Loans Department, the Library of Congress, Washington, D.C., for their generous and timely assistance in obtaining the legislative record, including the various versions of H.R. 320 and its amendments, 42d Congress, 1st session (1871). He is also indebted to Ms. Jennifer A. Toelke, Mr. Warren R. Mowery, Jr., and Mr. Richard M. Kerns for their research assistance. The author thanks Mr. Stephen M. Krentzman for proofreading the manuscript. Finally, he thanks his computer genie, Mrs. Barbara Ayala, for producing the final manuscript.

[1]365 U.S. 167

[2]Of course, the Eleventh Amendment immunizes the states from liability for damages under § 1983. But a state, municipalities, other political subdivisions, and their agents may be defendants under § 1983.

In the following decisions, the Court has examined state actors' liability for civil damages under § 1983: *Paul v. Davis*, 424 U.S. 693 (1976); *Estelle v. Gamble*, 429 U.S. 97 (1976); *In-*

(Continued on following page)

Specifically, these decisions examine the constitutional liability of states, municipalities, other political subdivisions, and their personnel under 42 U.S.C. § 1983 (hereinafter § 1983) for damages for violation of the individual's judicially defined rights to due process and equal protection.[3] While the Fourteenth Amendment clearly prohibits the states from taking positive actions that deprive due-process and equal-protection rights, more recently, some scholars[4] and federal-court decisions suggest that various forms of omission or inaction are also destructive of these judicially protected rights. Generally, these decisions determine state governmental liability by importing standards of tort liability into the Fourteenth Amendment[5] rather than articulating a satisfactory theory of constitutional lia-

---

(Continued from previous page)

graham v. Wright, 430 U.S. 651 (1977); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978); *Baker v. McCollan*, 443 U.S. 137 (1979); *Martinez v. California*, 444 U.S. 277 (1980); *Parratt v. Taylor*, 451 U.S. 527 (1981); *Burnett v. Grattan*, 468 U.S. 42 (1984); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Hudson v. Palmer*, 468 U.S. 517 (1984); *Brandon v. Holt*, 469 U.S. 464 (1985); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986); *Malley v. Briggs*, 475 U.S. 335 (1986); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986).

[3]On municipal liability for employees' actions in § 1983 suits, see *Hutto v. Finney*, 437 U.S. 678 (1978); *Owen v. City of Independence*, 445 U.S. 622 (1980); *Brandon v. Holt*, 469 U.S. 464 (1985); *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Kentucky v. Graham*, 473 U.S. 159 (1985); *Malley v. Briggs*, 475 U.S. 335 (1986); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986).

[4]See, for example, Heinzerling, Lisa E., "Actionable Inaction: Section 1983 Liability for Failure to Act," 53 *Univ. of Chicago L. Rev.* 1048-1073 (1986).

[5]*Id.*, at 1061-63.

bility based on the language, logic, and legislative history of the Fourteenth Amendment and section 1 of the Enforcement Act of 1871 (§ 1983), which the 42d Congress enacted to enforce the provisions of section 1 of the Fourteenth Amendment.[6]

Both the framing of the Fourteenth Amendment and § 1983 suggest that the states have an affirmative duty to protect the individual's right to due process and equal protection,[7] despite the negative formulation of the due process and equal protection clauses and § 1983. If the states fail to meet their affirmative duties, Congress has authority (under § 5 of the Fourteenth Amendment) to redress the states' failure through remedial legislation (e.g., § 1983). Furthermore, if the states have an affirmative duty to protect, conversely, inaction may imply a constitutional liability under § 1983.[8] Admittedly, not every failure to act deprives an individual of her or his fourteenth-amendment rights. Therefore, it is imperative to begin this inquiry by defining the scope of the rights that the Fourteenth Amendment (§ 1) encompasses.

---

[6]Ch. 22, 17 Stat. 13 (1871), codified as amended at 42 U.S.C. 1983 (1981).

[7]Curtis, Michael Kent, *No State Shall Abridge: The Fourteenth Amendment and The Bill of Rights* (Durham, N.C.: Duke Univ. Press, 1986).

[8]See *Estate of Bailey ex rel. Oare v. County of York*, 768 F.2d 503, at 510-511 (3rd Cir. 1985), and, by dictum, *Jensen v. Conrad*, 747 F.2d 185, at 190-194 (4th Cir. 1984). But see *Estate of Gilmore v. Buckley*, 787 F.2d 714, at 721-722 (1st Cir. 1986); *Harpole v. Arkansas Dept. of Human Services*, 820 F.2d 923, at 926 (8th Cir. 1987); *Wideman v. Shallowford Community Hosp., Inc.*, 826 F.2d 1030, at 1035-1036 (11th Cir. 1987); *Archie v. City of Racine*, 847 F.2d 1211, at 1223 (7th Cir. 1988).

The Fourteenth Amendment resulted from an evolutionary process of legislative bargaining and compromise among diverse and conflicting factions in the 39th Congress (1866)—among northern Democrats and radical, moderate, and conservative Republicans. There is no singular, collective intent; rather, the Fourteenth Amendment reflects the diverse intentions of its proponents and opponents. While the radicals (including Representative Jonathan Bingham, a principal draftsman of § 1) believed that the proposed amendment incorporated natural or fundamental rights and liberties (terms that members used interchangeably), some moderate Republicans argued that the amendment incorporated only those rights that the old Constitution comprehended. From the moderates' perspective, the proposed amendment merely applied constitutional limitations to the states, thus, overcoming the Supreme Court's decision in *Barron v. Baltimore.*[9] Conservative Republicans and northern Democrats generally argued that the proposed amendment merely constitutionalized the limited rights that Congress conferred in the Civil Rights Act of 1866.[10]

Assuming the narrowest construction of congressional intent, namely, that the Fourteenth Amendment merely constitutionalized the Civil Rights Act of 1866,[11] what re-

---

[9]32 U.S. (7 Pet.) 243 (1833).

[10]See Curtis, n. 7 *supra,* for an analysis of the various members' positions on § 1 of the Fourteenth Amendment. But see Berger, n. 11 *infra,* for a countervailing interpretation.

[11]Berger, Raoul, *Government by Judiciary: The Transformation of The Fourteenth Amendment* (Cambridge, Mass.: Harvard

(Continued on following page)

sponsibilities does § 1 impose on the states? Section 1 of the Act provides:

> That all persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, *and to full and equal benefit of all laws and proceedings for the security of person and property,* as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding (emphasis added).[12]

At the core of rights that section 1 of the Act protects is a person's physical security and property (today, property interests). Section 1 of the Act and the Fourteenth Amendment also guarantee equality of legal treatment regarding life, liberty, and property. Section 1 of the Act defines the substantive and procedural rights that citizens of the United States shall (imperative)[13] enjoy and enjoins the states from interfering with the enjoyment of such

---

(Continued from previous page)

Univ. Press, (1977). But see M. Curtis, n. 7 *supra.* Even if one assumes that Berger is correct, according to Charles Shattuck, the Framers of the Fourteenth Amendment understood the term "liberty" to comprehend personal liberty, i.e., the individual's security and freedom from unlawful restraint. See Shattuck, Charles E., "The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions Which Protect 'Life, Liberty, and Property'," 4 *Harv. L. Rev.* 365-392 (1891).

[12]Ch. 31, 14 Stat. 27 (1866), at 27.

[13]*West's Words and Phrases,* Vol. 39 (St. Paul, Minn.: West Pub. Co., 1953), at 111, 123.

rights. Although section 1 refers to various positive deprivations, it does not preclude deprivations arising from omissions or inaction, i.e., failure to protect.

While the rules of statutory construction require strict fidelity to statutory language, the rules of constitutional construction give the Court greater latitude in determining the intent of Congress in framing the Fourteenth Amendment. In the several stages of drafting the Amendment, a change occurred in the language of section 1. The early drafts incorporated positive or affirmative language,[14] while the final draft defined the states' responsibility in negative terms.[15] Since the federal courts have emphasized

---

[14]On January 27, 1866, Bingham first proposed language granting Congress affirmative power to protect the person's life, liberty, and property:

> Congress shall have power to make laws which shall be necessary and proper to secure to all persons in every State full protection in the enjoyment of life, liberty and property; and to citizens of the United States in every State the same immunities, and equal political rights and privileges.

On February 3rd, Bingham proposed the following amendment as a substitute for the January 27th resolution:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).

See Kendrick, Benjamin B., *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867; Columbia University Studies in History, Economics and Law Public Law*, Vol. 62 (New York: Columbia Univ. Press, 1914), at 60, 61.

[15]On April 28, 1866 Representative Bingham offered the following substitute for the language of § 1:

(Continued on following page)

the negative language of the amendment, it is important to determine whether the change in language implied a change in meaning or intent, i.e., whether the states' duty is affirmative or negative.

Despite its negative formulation, section 1 of the Fourteenth Amendment implies an affirmative governmental duty to secure the individual's right (legal entitlement) to due process and equal protection. Section 1 does not merely enjoin government from taking actions that abridge these rights.[16] Circuit Judge Easterbrook's opinion in *Archie v. City of Racine* to the contrary notwithstanding, the Fourteenth Amendment is more than "'a charter of negative rather than positive liberties.'"[17] The Fourteenth Amendment is a reflection, in part, of the natural-rights thinking that motivated its sponsors rather than the laissez-faire economic and political thought that influenced the Court in the latter part of the nineteenth century.[18]

(Continued from previous page)

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

See Kendrick, n. 17 *supra*, at 106

[16]See Soifer, Aviam, "Protecting Civil Rights: A Critique of Raoul Berger's History" 54 *N.Y.U. L. Rev.* 651-706 (1979).

[17]847 F.2d 1211, at 1220 (7th Cir. 1988), quoting from *Jackson v. City of Joliet*, 715 F.2d 1200, at 1203 (7th Cir. 1983).

[18]ten Broek, Jacobus, *Equal Under Law* (New York: Collier Books, 1965), at 21, 51, 52, 53-54, 190, 191; M. Curtis, n. 7 *supra*, at 54, 129-130; A. Soifer, n. 19 *supra*, at 704-705; Kelly, Alfred H., "The Fourteenth Amendment Reconsidered: The Segregation Question," 54 *Mich. L. Rev.* 1049-1086 (1956), at 1052-53.

Representative Bingham's early drafts of § 1 imposed an affirmative duty on Congress to enforce its provisions.[19] Bingham's early drafts would have made the enforcement of § 1 entirely dependent on congressional action. Bingham's later drafts and the final version shifted the affirmative congressional duty to the states, but granted Congress power to enforce § 1 rights in the event that the states failed, were unable, or refused to enforce its guarantees.[20] Section 1 also permitted Congress to adopt remedial legislation in the event that the states actively interfered with the individual's rights. However, the authors of § 1 never clarified the distinction between state action and inaction. Although the record is silent, the Court has chosen to give a limited meaning to "state action" (under § 1) and a narrow, remedial scope to congressional authority (under § 5).

Despite the Court's subsequent narrow construction of "state action" and congressional authority, the legislative history of the Enforcement Act of 1871 suggests that Congress had a broad rather than a narrow conception of its authority to enforce the citizen's fourteenth-amendment rights. In the face of continuing deprivations of the Freedman's constitutional rights, Congress enacted the Civil Rights Act of 1871 (the Enforcement Act). Confronted with the southern states' failure to enforce the Fourteenth Amendment's guarantees of due process and equal protection, Congress established civil liability for:

---

[19]See n. 17 *supra*.

[20]See n. 18 *supra*, and Kendrick, *The Journal of the Joint Committee on Reconstruction*, at 116.

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States . . . .[21]

As the legislative record indicates, Congress was concerned with the failure of the states or their agents to protect the individual's constitutional rights as well as the states' active deprivation of such rights.

Considered in the historic context of Reconstruction, the Enforcement Act of 1871 explicitly recognized the states' failure to protect the individual's constitutional rights, provided various remedies for state deprivations, including the use of military force,[22] suspension of the privilege to the writ of habeas corpus,[23] expansion of the federal courts' jurisdiction, and federal civil and criminal remedies.[24] Given the historic context and Congress' remedial intent, what constitutional rights does the Act encompass? And, did Congress intend to cover the failure (omission) to protect the individual's rights as well as the active deprivation of these rights by the states and their agents (i.e., persons acting under color of law, etc.)?

Since there was virtual consensus on § 1 of the Act, neither the House of Representatives nor the Senate debated this provision extensively. And, the language of § 1

---

[21]Ch. 22, 17 Stat. 13 (1871), at 13.

[22]*Id.*, § 3, at 14.

[23]*Id.*, § 4, at 14-15.

[24]*Id.*, § 2, at 13-14.

does not elucidate the problem. Therefore, it is necessary to refer to the language and consideration of the Act's other provisions in order to determine congressional intent. Section 3, which concerns insurrection, domestic violence, unlawful combinations, and conspiracies that deprive persons of their constitutional rights, specifically addresses the failure of state authorities to protect the individual's rights. In the event that:

> the constituted authorities of such State shall either be unable to protect; or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States[.][25]

Although Congress rejected Senator Sherman's amendment to H.R. 320 (the Enforcement Act of 1871), which would have established municipal corporate liability for private deprivations of constitutionally protected rights,[26] both the language of the proposed amendment and the tenor of the debate suggest that the members of the House and, to a lesser degree, the Senate contemplated the failure of public agents to protect the individual's rights. Despite congressional rejection of municipal corporate liability for private, riotous deprivations,[27] the Act included § 1 of H.R. 320, virtually as introduced, which

---

[25] *Id.*, § 3, at 14.

[26] 42d Cong., 1st Sess. (1871).

[27] On April 19th the House refused to accept the first conference committee's report, which included the Sherman amendment. Cong. Globe 800-801 (April 19, 1871) (vote: yeas 74, nays 106, not voting 50).

made public agents liable for their deprivations of constitutional rights.[28] However, throughout the debate on Sherman's amendment, § 1 of the bill, and the other provisions of H.R. 320 there is no evidence to suggest that Congress rejected the concept of state agents' liability for their failure to protect the individual's constitutional rights. Indeed, there is ample evidence in the House and Senate debates to demonstrate that the bill's proponents and opponents, alike, contemplated inaction as well as action.

When the House of Representatives took up H.R. 320, on March 28, 1871, Mr. Shellabarger (R.-Ohio), the bill's floor manager, immediately addressed the scope of the rights and the judicial remedies that § 1 incorporated. In addressing these issues, he referred to the Civil Rights Act of 1866.[29] Undoubtedly, this Act (see App. 20 *supra*) encompassed the person's physical security and property. Other Republican representatives, who supported H.R. 320, echoed Shellabarger's views. Quoting from Mr. Justice Washington's opinion in *Corfield v. Coryell*, on March 29th, Representative George Hoar (R.-Mass.) noted that Congress had authority, under the Fourteenth Amendment, to protect the privileges and immunities of citizenship, including:

> the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the Government

---

[28] 42d Cong., 1st Sess. (1871).

[29] Cong. Globe 317 (March 28, 1871) (statement of Rep. Shellabarger).

may justly prescribe for the general good of the whole.[30]

The next day, March 31st, Representative James Monroe (R.-Ohio) emphasized that:

> A constitution is a means, and not an end. Life, liberty, and happiness do not exist for the sake of the constitution, but the constitution exists and was framed for their sake. In interpreting the constitution of any great, free country there is a fair presumption that it contains sufficient grants of power to the legislative body to secure the great primal objects for which constitutions and Governments exist.
>
> * * *
>
> When, therefore, occasions arise in which life, liberty, and property require new guarantees for their security, members of a legislative body are not to be repelled by mere novelty in the details of a bill like this from a candid examination of it.[31]

And, in examining the constitution, Monroe found warrant for the proposed Enforcement Act of 1871.[32]

Immediately thereafter, Mr. Lowe (R.-Kan.) noted that, if government could not protect the citizen's right to life and liberty, civil government had failed to perform its fundamental responsibility. Supporting the proposed act, Lowe concluded, "[t]he cardinal doctrine of our institutions is that all citizens are equal before the law, and

---

[30] *Id.*, at 334 (March 29, 1871) (statement of Rep. Hoar).

[31] *Id.*, at 370 (March 31, 1871) (statement of Mr. Monroe).

[32] *Id.*

that the law shall equally secure to all, their natural and inalienable rights.'"[33]

On April 1st, two other proponents of H.R. 320, Representative Hawley (R.-Ill.) and Representative Rainey (R.-S.C.) addressed the rights that §1 of the bill covered. While Hawley emphasized that § 1 covered only constitutionally protected rights, both Hawley and Rainey understood these rights to include the protection of life, liberty, and property.[34] In a powerful concluding statement, Representative Rainey noted:

> If the Constitution which we uphold and support as the fundamental law of the United States is inadequate to afford security to life, liberty, and property—if, I say, this inadequacy is proven, then its work is done, then it should no longer be recognized as the Magna Charta of a great and free people[.][35]

Two days later, on April 3rd, § 1 received attention, once again, when Representative John Beatty (R.-Ohio) observed that a basic purpose of H.R. 320 was to promote the equal protection of the law.[36] Beatty stressed that the bill protected only federal constitutional rights, but he failed to define those rights. In contrast to Beatty's cautious approach, on April 4th, Ben Butler (R.-Mass.) offered an expansive interpretation of the rights that § 1 included. Given to hyperbole, Butler remarked:

---

[33] *Id.*, at 374 (March 31, 1871) (statement of Rep. Lowe).

[34] *Id.*, at 380, 395 (April 1, 1871) (statements of Rep. Hawley and Rep. Rainey).

[35] *Id.*, at 395 (statement of Rep. Rainey).

[36] *Id.*, at 428 (April 3, 1871) (statement of Rep. Beatty).

> If the General Government has not the constitutional power to protect the lives, liberty, and property of its citizens upon its own soil when such protection is needed, then it ought to have such power; it should reside somewhere in the Government. For without the power to protect the lives of its citizens, a republican government is a failure, and if such be constitutional law, to be a citizen of the United States is to be the most unprotected of all mankind.[37]

However, Butler did not doubt congressional power to protect life, liberty, and property in the states.

During the next two days of floor debate, April 5th and 6th, Republican proponents of H.R. 320 continued to focus on the rights that § 1 encompassed. Stressing the bill's comprehensive scope, Representative Henry Dawes (R.-Mass.) stated:

> No subject for legislation was ever brought before the American Congress so broad and comprehensive, embracing as it does all other considerations hitherto affecting the life, liberty, and pursuit of happiness of every citizen of this Republic.[38]

Dawes then observed that the first remedy the bill provided was resort to the federal courts. H.R. 320 offered individuals civil and criminal remedies for the protection of their constitutional right to life and liberty.[39]

In defending congressional authority to enact H.R. 320, Representative Jeremiah Wilson (R.-Ind.) argued that the Fourteenth Amendment imposed an affirmative duty on

---

[37] *Id.*, at 448 (April 4, 1871) (statement of Rep. Butler).

[38] *Id.*, at 475 (April 4, 1871) (statement of Rep. Dawes).

[39] *Id.*, at 476.

the states to guarantee to every person within their respective jurisdictions the equal protection of the law.[40] Should a state fail to meet its responsibility, Congress had ample remedial power (under § 5 of the Fourteenth Amendment) to redress constitutional wrongs. Finally, on April 6th, Representative Legrand Perce (R.-Miss.) posed the central remedial problem confronting the House. "The question before the House," Perce asked rhetorically, "is whether life and property and liberty are secure in the eleven States formerly rebellious."[41]

Throughout the House debates concerning the scope of § 1 several lessons are clear. The proponents of H.R. 320 believed that the Constitution provided for the protection of life, liberty, and property. The bill's advocates assumed that Congress had adequate authorty under the Fourteenth Amendment to secure these rights against state deprivations. And, most Republican representatives who addressed the issue based their views of constitutional rights on natural-rights theory rather than the laissez-faire ideology that the Court later imported into the Constitution.

In the Senate § 1 of H.R. 320 received even less attention than it had in the House of Representatives. Four days after the Senate began consideration of the bill, on April 11th, Senator George Edmunds (R.-Vt.), the Republican floor manager, observed that the President could employ military power (under § 3) if, as a matter of fact, unlawful conspiracies or insurrections had prevented a

---

[40] *Id.*, at 482 (April 5, 1871) (statement of Rep. Wilson).

[41] *Id.*, at 512 (April 6, 1871) (statement of Rep. Perce).

state's authorities from enforcing state and federal law and had denied to "portions and classes of the people of a State of their constitutional rights of life, liberty, and property, and the protection of the laws[.]"[42] Although § 3 refers to conspiracies, insurrections, and domestic violence, and authorizes the President to employ military force, the debate provides a gloss for the rights that § 1 defines. In his introductory remarks, Senator Edmunds also observed that § 1 of H.R. 320 merely carried out "the principles of the civil rights bill [of 1866], which have since become a part of the Constitution."[43] According to Senator Edmunds, § 1 provided civil remedies for state actions that deprive citizens of their rights to due process and equal protection.[44]

During a colloquy with Senators Carl Schurz (R.-Mo.) and Lyman Trumbull (R.-Ill.), on April 14th, Edmunds further articulated his views on the scope of § 1. Claiming that H.R. 320 was within the clear scope of constitutional authority,[45] Senator Edmunds stated that the legislative objective was to "preserve the liberties and the rights of its citizens[.]"[46] Like most moderate Republicans, Edmunds argued that the Fourteenth Amendment simply overcame the limitations of *Barron v. Baltimore* and prohibited the states "from depriving a man of life, liberty, or property without due process of law[.]"[47] The proposed legislation

---

[42] *Id.*, at 567 (April 11, 1871) (statement of Sen. Edmunds).

[43] *Id.*, at 568.

[44] *Id.*

[45] *Id.*, at 691 (April 14, 1871) (statement of Sen. Edmunds).

[46] *Id.*

[47] *Id.*, at 693.

merely enforced the Fourteenth Amendment's promise of due process and equal protection against state interference. While Matthew Carpenter (R.-Wisc.) shared Edmunds' views,[48] Senator Charles Sumner (R.-Mass.) implied that the Fourteenth Amendment embodied the principles of the Declaration of Independence.[49] However, Sumner (a radical Republican) failed to specify which principles he meant. Given his natural-rights philosophy, one can speculate that he meant the Declaration's inalienable rights of life, liberty, and the pursuit of happiness, but the record is silent.

Opponents of H.R. 320, including Trumbull and Garrett Davis (D.-Ky.), attacked the bill as a usurpation of the states' authority to protect the citizen's rights. Trumbull denied that the national government had constitutional authority to protect the individual's "personal rights of person and property."[50] Since the Fourteenth Amendment had not extended "the rights and privileges of citizenship one iota[,]" Trumbull noted, there was no authority for legislation creating new substantive rights. The federal government only had authority to prevent the states from depriving persons of life, liberty, and property without due process of law.[51] During the same debate Senator Davis expressed similar views, adding that the pur-

---

[48] *Id.*, at 577 (April 11, 1871) (statement of Sen. Carpenter).

[49] *Id.*, at 651 (April 13, 1871) (statement of Sen. Sumner).

[50] *Id.*, at 575 (April 11, 1871) (statement of Sen. Trumbull).

[51] *Id.*, at 576, 577, 578, 579.

pose of the Fourteenth Amendment (§ 1) was to "abolish discriminations."[52]

Apparently, the radicals were less persuasive in the Senate than in the House of Representatives. The Senators who favored H.R. 320 took a more limited view of the rights that § 1 protected than their cohorts in the House. The bill's opponents delivered a jeremiad, claiming that the it would confer new, wholly unanticipated and unwarranted substantive rights, would transform the American federal system, and would convert the states into provinces of a centralized empire. In sum, the House and Senate debates indicate the absence of a consensus on the scope and nature of the rights that the Fourteenth Amendment conferred and that the proposed legislation enforced. While radical Republicans and Democrats argued that the proposed legislation created new and wholly unwarranted substantive rights, moderate and conservative Republicans portrayed H.R. 320 as a procedural measure that the Fourteenth Amendment authorized. The lack of consensus on § 1 of the Fourteenth Amendment and § 1 of the Enforcement Act of 1871 has given the Court considerable opportunity and latitude to provide both substantive and procedural meaning to the evolving American concept of constitutional due process.

While there was a lack of consensus among the bill's proponents concerning the scope and meaning of due-process rights, they shared the belief that the proposed Enforcement Act would create civil liability for inaction (i.e., the state's failure to enforce due-process rights) as

---

[52] *Id.*, at 648 (April 13, 1871) (statement of Sen. Davis).

well as action (i.e., active deprivation of such rights). Indeed, the 42nd Congress legislated in the context of the southern states' failure to enforce the Freedman's newly secured right to due process and equal protection. The Enforcement Act's proponents also intended to secure the constitutional rights of loyal Whites as well as Blacks who had been subjected to private violence while state, county, and municipal authorities failed, refused, or were unable to suppress the Ku Klux Klan and other conspiracies. At least sixteen members of Congress specifically addressed the issue of state inaction and one, Ben Butler, expressly stated the belief that the Fourteenth Amendment imposes an affirmative duty on the states to enforce the individual's right to due process and equal protection.

On March 29th, the day after the Select Committee reported H.R. 320, Representative George Hoar (R.-Mass.) confronted the state's failure to meet their affirmative duty. Referring to the Equal Protection Clause of the Fourteenth Amendment, Hoar noted:

> Now, sir, what does the Constitution mean when it authorizes Congress to interfere by "appropriate legislation" in the case of the denial by a State to any person within its jurisdiction of the protection of the laws? If it had been the purpose of the American people, in accepting this article, to provide merely for the case of an affirmative formal exercise of power by the State in derogation of civil rights, that last clause would have been unnecessary, because the preceding part had provided that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." But the provision goes on to say that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

> Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection.[53]

Although Hoar addressed the Equal Protection Clause, his remarks are applicable to the parallel, negative construction of the Due Process Clause.

Examining the bill as a whole, on March 31st, Mr. Sheldon (R.-La.) found it unthinkable that Congress lacked the power to enact remedial legislation in the event that the states fail to protect life, liberty, or property. "Shall it be said," Sheldon observed,

> that the citizen may be wrongfully deprived of his life, liberty, and property in his own country and at his own homestead, and the national arm cannot be extended to him because there is a State government whose duty it is to afford him redress, but refuses or neglects to discharge that duty?[54]

The very next speaker, Mr. Monroe (R.-La.), echoed Sheldon's view. Posing the question rhetorically, Monroe queried,

> In case life and liberty are insecure in any State, and that State virtually denies the necessary protection, are we still to be told that even now the Constitution does not confer upon Congress sufficient power to provide for this emergency?[55]

---

[53] *Id.*, at 334 (March 29, 1871) (statement of Rep. Hoar).

[54] *Id.*, at 368 (March 31, 1871) (statement of Rep. Sheldon).

[55] *Id.*, at 370 (March 31, 1871) (statement of Rep. Monroe).

A short time later, Representative Lowe (R.-Kan.) argued that the Fourteenth Amendment would have no "practical operation and effect,"[56] if Congress could not secure the person's constitutional rights in the face of state inaction:

> What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislation of a State? If a State has no law upon its statute book obnoxious to objection under the article referred to, but nevertheless permits the rights of citizens to be systematically trampled upon without color of law, of what avail is the Constitution to the citizen?
>
> The argument leads to the deduction that while the first section of the amendment prohibits all deprivation of rights by means of State laws, yet all rights may be subverted and denied, without color of law, and the Federal Government have no power to interfere. . . . Such a position, Mr. Speaker, defeats itself by its own absurdities.[57]

Later in the debates, on April 3rd and April 4th, several of the bill's proponents again confronted the issue of the states' failure to protect the individual's constitutional rights. Representative Ellis Roberts (R.-N.Y.) argued that government's highest duty is to protect the citizen's rights. Roberts emphasized:

> And there are ethics which underlie and inspire and interpret constitutions. Obligations are mutual. Allegiance presupposes protection. The chief sovereignty guaranties that, and failure anywhere it must correct. Nothing can so weaken the life of a Government

---

[56] *Id.*, at 375 (March 31, 1871) (statement of Rep. Lowe).

[57] *Id.*

as even to seem to neglect its citizens. No higher duty can exist than to protect them. Be they white or black, they must have free speech, a free ballot, and a safe home.[58]

Referring to § 3 of H.R. 320, Representative Beatty (R.-Ohio) stressed Congress' affirmative duty to remedy the failure of state authorities to protect the individual's rights:

> The State, from lack of power or inclination, practically denied the equal protection of the law to these persons. It is to remedy this evil and cover these proscribed and outraged citizens with the shield of the Constitution that we propose to authorize the President to send military aid to the local authorities in these lawless sections.
>
> • • •
>
> [A]dmit for the sake of argument that the number of these outrages is exaggerated, that the rights of but one citizen have been stricken down, and that the State wherein the offense was committed has by reason of indifference or lack of power failed to redress his wrongs[.] . . . [W]hat should we do? . . . Shall the Government abandon him [the outraged citizen] in the time of his danger? Does it owe him nothing? Shall it not interfere for his protection? Surely, if it fails to do so it is unworthy [of] the name of a Government.[59]

In a lengthy Philippic, on April 4th, Ben Butler (R.-Mass.) argued that Congress has an affirmative duty to

---

[58] *Id.*, at 414 (April 3, 1871) (statement of Rep. Roberts).

[59] *Id.*, at 428, 429 (April 3, 1871) (statement of Rep. Beatty).

protect the individual's constitutional rights in the event that a state fails or neglects to do so:

> If the Federal Government cannot pass laws to protect the rights, liberty, and lives of citizens of the United States in the States, why were guarantees of those fundamental rights put in the Constitution at all, and especially by acts of amendment?
>
> All agree that the mere constitutional assertion of affirmative guarantees not made operative by law, are ineffectual to aid the citizen. How, then, can the citizen avail himself of those constitutional guarantees and affirmative declarations of his rights, if Congress cannot pass laws to make them operative? How can it be an interference with the rights of the States for the laws of the United States to afford that protection to its citizens which the State fails or neglects to do for itself?
>
> Is it one of the rights of a State not to protect its citizens in the enjoyment of life, liberty, and property, and thereby deny him the equal protection of the laws, so that, when the General Government attempts to do for the protection of the citizen what the State has failed to do, it is to be held an interference with the rights of the State?[60]

Shortly thereafter, Representative John Coburn reiterated Butler's argument:

> Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. . . . This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard

---

[60] *Id.*, at 448 (April 4, 1871) (statement of Rep. Butler).

> the sufferer and his persecutor, and treat the one as a nonentity and the other as a good citizen.[61]

Although several other representatives articulated similar views of congressional authority (under § 5 of the Fourteenth Amendment) and the legislative intent of H.R. 320, on April 5th, Representative Jeremiah Wilson (R.-Ind.) offered the most cogent explanation of Congress' constitutional authority to remedy deprivations of individual rights resulting from state inaction. Referring to the Equal Protection Clause, Wilson commented:

> [W]hen it is provided that no State shall deny to any person the equal protection of the laws it certainly is meant and it is equivalent to a provision that all citizens shall be equally protected. The word "deny," therefore, as used here, must be construed with reference to the spirit of the whole instrument. It is equivalent to the phrase "fail or refuse to provide for," and the true construction of the provision is: "No State shall fail or refuse to provide for the equal protection of the laws to all persons within its jurisdiction."[62]

If the states deny equal protection, Wilson concluded, Congress has power under § 5 of the Fourteenth Amendment to enforce the equal protection of the laws.

Unlike the House debates, the Senate's consideration of H.R. 320 does not further illuminate its author's original understanding. Only two of the bill's advocates, Senators Edmunds (the floor manager) and John Pool (Whig-N.C.), expressed their views on the states' failure to en-

---

[61] *Id.*, at 459 (April 4, 1871) (statement of Rep. Coburn).

[62] *Id.*, at 482, 483 (April 5, 1871) (statement of Rep. Wilson).

force the right to due process and equal protection. Regarding equal protection, Pool had no doubt that "[w]here any State, by commission or omission, denies this right to the protection of the laws, Congress may, by appropriate legislation, enforce and maintain it."[63] Pool also assumed that the states have an obligation to enforce the right to personal liberty and security:

> The protection of the laws can hardly be denied except by failure to execute them. . . . Rights conferred by laws are worthless unless the laws be executed. The right to personal liberty or personal security can be protected only by the execution of the laws upon those who violate such rights. A failure to punish the offender is not only to deny to the person injured the protection of the laws, but to deprive him, in effect, of the rights themselves.[64]

Later in the debate, on April 14th, Senator Edmunds asserted that for eight-hundred years, since Magna Charta, government had had an obligation to protect the citizen's rights and liberties. Edmunds argued that this governmental duty is affirmative rather than "a mere denial of the right of a State to interfere with life, liberty, and property, and to prevent due redress."[65] Obviously referring to the Fourteenth Amendment, Edmunds concluded that the national government has the power to protect citizens should the local authorities of a state tolerate or knowingly wink at deprivations of the citizen's rights.[66] Sen-

---

[63] *Id.*, at 608 (April 12, 1871) (statement of Sen. Pool).

[64] *Id.*

[65] *Id.*, at 697 (April 14, 1871) (statement of Sen. Edmunds).

[66] *Id.*, at 697, 698.

ators George Vickers (D.-Md.) and Allen Thurman (D.-Ohio), who opposed H.R. 320, conceded that the bill was predicated on the assumption that the states had failed to act.[67] However, they rejected the proposition that the Fourteenth Amendment authorized Congress to remedy state legislative inaction. Vickers and Thurman also opposed the measure as an invasion of the states' internal affairs.[68]

The House and Senate debates on H.R. 320 yield four important propositions concerning the state-action doctrine. First, the bill's proponents believed that the Framers of the Fourteenth Amendment contemplated state inaction as well as state action depriving individuals of their constitutional rights. Second, both the states and the national government have an affirmative duty or obligation to protect citizens in the enjoyment of their constitutional rights. Third, when the states fail to act, Congress has ample authority under § 5 of the Fourteenth Amendment to take affirmative action. Fourth, H.R. 320 was intended to remedy the states' failure to protect all persons in the enjoyment of their constitutional rights.

If the authors of the Enforcement Act of 1871 contemplated inaction (omission) as well as state action, what forms of inaction did they comprehend? From the Senate and House debates (*supra.*), it is possible to discern several forms of inaction for which they created civil liability. First, they understood inaction to include the refusal of a

---

[67] *Id.*, at 661 (April 13, 1871) (statement of Sen. Vickers), 772 (April 18, 1871) (statement of Sen. Thurman).

[68] *Id.*

state and its agents to act or protect persons in the enjoyment of their constitutional rights. Second, they contemplated the knowing or illicit wink, i.e., a state authority's knowing tolerance and/or acceptance of private deprivation of rights. Third, they comprehended a state's passivity, i.e., its unexplained or inexplicable failure to intervene even when its authorities know of private deprivations of life, liberty, or property. Fourth, they were aware of the state's inability to act in the face of riotous conduct, but provided for military action rather than municipal corporate liability to redress harms arising from riotous conduct. As this analysis of the legislative history of 42 U.S.C. § 1983 suggests, the Court should develop standards of constitutional liability that comprehend the failure of a state or its agents to secure the person's right to life, liberty, and property rather than insinuate standards of tort liability into the Fourteenth Amendment.

---

(8)

No. 87-154

Supreme Court, U.S.
FILED
AUG 12 1988

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOSHUA DESHANEY, A MINOR, BY HIS GUARDIAN AD LITEM, AND MELODY DESHANEY, PETITIONERS

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ROY T. ENGLERT, JR.
Assistant to the Solicitor General

BARBARA L. HERWIG
JOHN S. KOPPEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a county government and employees of its Department of Social Services can be held liable for violating the Due Process Clause of the Fourteenth Amendment by failing to prevent the abuse of a child by his father.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	6
Argument:	
Respondents did not "deprive" Joshua DeShaney of liberty or property within the meaning of the Due Process Clause	8
A. Respondents did not deprive Joshua DeShaney of his liberty interest in personal security	9
B. Respondents' alleged violations of state law do not constitute violations of the Due Process Clause	19
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Archie v. *City of Racine*, 847 F.2d 1211 (7th Cir. 1988) ... 10, 12, 16, 17, 21
Baker v. *McCollan*, 443 U.S. 137 (1979) ... 8
Barney v. *City of New York*, 193 U.S. 430 (1904) ... 20
Beard v. *O'Neal*, 728 F.2d 894 (7th Cir.), cert. denied, 469 U.S. 825 (1984) ... 16
Beck v. *Washington*, 369 U.S. 541 (1962) ... 20
Bergmann v. *United States*, 689 F.2d 789 (8th Cir. 1982) ... 19
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) ... 2
Board of Pardons v. *Allen*, No. 86-461 (June 9, 1987) ... 21
Board of Regents v. *Roth*, 408 U.S. 564 (1972) ... 21
Bowers v. *DeVito*, 686 F.2d 616 (7th Cir. 1982) ... 16
Bradberry v. *Pinellas County*, 789 F.2d 1513 (11th Cir. 1986) ... 10, 13, 16
California v. *Greenwood*, No. 86-684 (May 16, 1988) ... 21
Daniels v. *Williams*, 474 U.S. 327 (1986) ... 8, 9, 10, 11, 12, 14, 17, 22
Davidson v. *Cannon*, 474 U.S. 344 (1986) ... 15

Cases – Continued: Page

Doe v. *New York City Dep't of Social Services*, 649 F.2d 134 (2d Cir. 1981), after remand, 709 F.2d 782, cert. denied, 464 U.S. 864 (1983) 15
Ellsworth v. *City of Racine*, 774 F.2d 182 (7th Cir. 1985), cert. denied, 475 U.S. 1047 (1986) 16
Escamilla v. *City of Santa Ana*, 796 F.2d 266 (9th Cir. 1986) 16
Estate of Bailey ex rel. Oare v. *County of York*, 768 F.2d 503 (3d Cir. 1985) 10, 17
Estate of Gilmore v. *Buckley*, 787 F.2d 714 (1st Cir.), cert. denied, 479 U.S. 882 (1986) 10, 13, 16
Estelle v. *Gamble*, 429 U.S. 97 (1976) 14
Harpole v. *Arkansas Dep't of Human Services*, 820 F.2d 923 (8th Cir. 1987) 16
Harris v. *McRae*, 448 U.S. 297 (1980) 12
Hebert v. *Louisiana*, 272 U.S. 312 (1926) 20
Hewitt v. *Helms*, 459 U.S. 460 (1983) 21
Hudson v. *Palmer*, 468 U.S. 517 (1984) 22
Ingraham v. *Wright*, 430 U.S. 651 (1977) 9
Jackson v. *Byrne*, 738 F.2d 1443 (7th Cir. 1984) 10, 18
Jackson v. *City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984) 12, 13, 16
Jensen v. *Conrad*, 747 F.2d 185 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985) 17
Ketchum v. *Alameda County*, 811 F.2d 1243 (9th Cir. 1987) 16
Maher v. *Roe*, 432 U.S. 464 (1977) 12
Martinez v. *California*, 444 U.S. 277 (1980) 8, 9, 17
Murray's Lessee v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How). 272 (1856) 12
Parratt v. *Taylor*, 451 U.S. 527 (1981) 8, 11, 19
Paul v. *Davis*, 424 U.S. 693 (1976) 8, 17
Pennhurst State School & Hosp. v. *Halderman*, 465 U.S. 89 (1984) 20
Rankin v. *City of Wichita Falls*, 762 F.2d 444 (5th Cir. 1985) 16
Redmond v. *United States ex rel. SEC*, 518 F.2d 811 (7th Cir. 1975) 19
Silverman v. *Barry*, 845 F.2d 1072 (D.C. Cir. 1988) 20
Snowden v. *Hughes*, 321 U.S. 1 (1944) 19-20

Cases – Continued: Page

Stern v. *Tarrant County Hosp. Dist.*, 778 F.2d 1052 (5th Cir.), cert. denied, 476 U.S. 1108 (1985) 20
Taylor ex rel. Walker v. *Ledbetter*, 818 F.2d 791 (11th Cir. 1987), petition for cert. pending, No. 87-521 15
Turner v. *United States*, 248 U.S. 354 (1919) 19
Walker v. *Rowe*, 791 F.2d 507 (7th Cir.), cert. denied, 479 U.S. 994 (1986) 16
Washington v. *District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986) 16
West v. *Atkins*, No. 87-5096 (June 20, 1988) 14
White v. *Rochford*, 592 F.2d 381 (7th Cir. 1979) 16
Wideman v. *Shallowford Community Hosp., Inc.*, 826 F.2d 1030 (11th Cir. 1987) 13, 16
Wood v. *Ostrander*, No. 87-3924 (9th Cir. July 13, 1988) 16
Youngberg v. *Romeo*, 457 U.S. 307 (1982) 12, 14, 19

Constitution and statutes:

U.S. Const.:
Amend. V (Due Process Clause) 1-2, 5
Amend. VIII 14
Amend. XI 20
Amend. XIV (Due Process Clause) ..... *passim*
42 U.S.C. 1983 ..... 4, 9, 18
Wisconsin Children's Code, Wis. Stat. Ann. §§ 48.01 *et seq.* (West 1987) 9
Wis. Stat. Ann. § 893.80(3) (West 1983) 22

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-154

JOSHUA DESHANEY, A MINOR, BY HIS GUARDIAN AD LITEM, AND MELODY DESHANEY, PETITIONERS

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The Court's decision in this case may affect the extent to which federal employees may be held personally liable for acts committed in the course of their employment. Several agencies of the United States, particularly law enforcement agencies such as the Federal Bureau of Investigation, endeavor within reasonable and lawful limits to protect the general public, and sometimes particular individuals, from assaults and other kinds of harm. If petitioners prevail in this case, then persons who suffer such harm could sue individual federal employees who did not successfully prevent their injuries, on the theory that the federal employees' failure to provide sufficient protective services violates the Due Process Clause of the Fifth

Amendment and thus gives rise to a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

STATEMENT

1. There has been no adjudication of the facts of this case. Because the case was resolved against petitioners on summary judgment below, the facts must be viewed in the light most favorable to petitioners.

On March 8, 1984, shortly before his fifth birthday, Joshua DeShaney was taken to the hospital and given emergency brain surgery. Joshua is now permanently and severely brain damaged and will be institutionalized the rest of his life. The cause of his brain damage was persistent abuse by his natural father, Randy DeShaney, who had custody of Joshua pursuant to a divorce decree previously entered by a Wyoming court. Pet. App. 37, 38-39, 50, 61; J.A. 121-123.

For some time before March 8, 1984, employees of the Winnebago County (Wisconsin) Department of Social Services suspected that Joshua was being abused. The Department's attention first focused on Joshua on January 22, 1983, when he was admitted to the Theda Clark Regional Medical Center for treatment of numerous bruises (J.A. 110-111).[1] Although child abuse was suspected at that time, and the Department obtained an order from a Wisconsin juvenile court placing Joshua temporarily in the hospital's custody (Pet. App. 37, 53-54), county attorney John Bodnar decided that there was not enough evidence to take the child abuse allegations to the juvenile court (J.A. 93). Proceedings in the juvenile court

[1] An earlier allegation that Randy DeShaney was abusing Joshua was made to the police department in January 1982 and may have been reported to the Department (see J.A. 152-153).

were terminated, and Joshua was returned to Randy DeShaney's custody on January 25, 1983 (Pet. App. 56).

Between January 22, 1983, and March 8, 1984, respondent Ann Kemmeter, a social worker in the Department, made various efforts to monitor Joshua's situation (see J.A. 110-121, 129-132). Through those efforts Kemmeter became aware of various injuries that Joshua suffered; Randy DeShaney and Marie DeShaney, the woman who lived with him, consistently attributed those injuries to accidents (*ibid.*). Kemmeter regularly recorded her suspicions that the cause of Joshua's frequent injuries was abuse rather than accidents (*ibid.*). There is evidence that she said, after the tragic events of March 8, 1984, that she "knew the phone would ring some day and Joshua would be dead" (Pet. App. 38-39; J.A. 107).

The Department persuaded Randy DeShaney to sign a contract promising to place Joshua in a Head Start program (where his condition could be monitored), but the Department never forced Randy to comply with that contract (Pet. App. 37-38, 56-57). The Department also never took various other steps that, in petitioners' view, a competent social worker would have taken in response to the evidence that Kemmeter gathered suggesting child abuse. Petitioners do not contend that anything respondents *did* harmed Joshua in any way; rather, they fault respondents exclusively for what they did *not* do. In particular, petitioners appear to fault the Department for not seeking court intervention in January 1983 (Pet. Br. 5); for not investigating various incidents of possible abuse more thoroughly (*id.* at 6, 26, 28); for not intervening on occasions when Joshua was found at home alone (*id.* at 6); for not visiting Joshua often enough and for not insisting on seeing him when Kemmeter did visit (*id.* at 7, 21); for not contacting Joshua's natural mother (petitioner Melody DeShaney), who lived in Wyoming (*id.* at 8, 32); for not

arranging medical care for Joshua (*id.* at 20-21, 22, 32); for not coordinating their efforts with those of the police (*id.* at 28); for not seeking "a court order making the family's participation mandatory" (*id.* at 32); and for not seeking foster home placement (*ibid.*). See also Pet. Br. 10, 12, 31 (relying on respondents' "refusal to act"); *id.* at 11 (relying on "right to be protected by the state"); *id.* at 13, 16 (relying on "affirmative duty" of protection); *id.* at 18 (relying on "right to receive appropriate protection"); *id.* at 28 (relying on respondents' alleged failure to "perform the functions and duties which were mandated under the [state] statute").

2. Joshua (by a guardian ad litem) and his mother sued the agency and its employees in federal court under 42 U.S.C. 1983, alleging that their failure to protect Joshua from Randy DeShaney's abuse constituted an unconstitutional deprivation of Joshua's liberty or property without due process of law. The district court granted summary judgment to the defendants. (The court also dismissed pendent state-law tort claims against these defendants and against Randy DeShaney without prejudice.) Pet. App. 47-75. The court reasoned that "[t]he Fourteenth Amendment's concept of liberty does not include the right to basic public services" (*id.* at 62) in the absence of a "special relationship" between the individual and the state (*id.* at 63). The court also held that, although there was "no bright line by which the existence of a special relationship for Section 1983 purposes may be determined" (*id.* at 65), there was no such relationship on the facts of this case (*id.* at 66-73).

The court of appeals affirmed. The court hypothesized two different "rights" of which Joshua might claim to have been deprived: (1) "a right—a form of liberty or property—to be protected by the Department of Social Services from the brutalities perpetrated by his father"; and (2) "his

right to bodily integrity (again viewed as a form of liberty or property within the meaning of the due process clause)" (Pet. App. 39). The court disposed of the first hypothesized "right" summarily by invoking "the rule, well established in this circuit, that the state's failure to protect people from private violence, or other mishaps not attributable to the conduct of its employees, is not a deprivation of constitutionally protected property or liberty" (*id.* at 39-40).

Focusing on the second hypothesized "right" at greater length, the court restated the question as whether "the state was complicit in the beatings" (Pet. App. 41), and proceeded to discuss the issue in terms of causation (*id.* at 41-43). The court found causation to be lacking, apparently on the theory that the state did not increase the probability of harm but merely failed to decrease it. The court distinguished this case from one "where the state places the victim in a situation of high risk, thus markedly increasing the probability of harm and by doing so becoming a cause of the harm" (*id.* at 43). The court also explicitly "reject[ed] the proposition embraced by a divided panel of the Third Circuit in *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 510-11 (1985), that once the state is aware of the danger that a particular child may be abused, a special relationship arises between it and the child and places on the state a constitutional duty to protect the child from the abuse" (Pet. App. 44). The court acknowledged that in prison cases there is a "special relationship" that has been held to place limited constitutional duties (under the Due Process Clause) on the state to protect inmates from certain kinds of harm, but the court declined to extend the concept to cases like this one on the ground that what is "special" about that relationship is not present in this setting: "the prison authorities, having placed the inmate in a position of danger, cannot shrug off all

responsibility when the danger materializes and injury results" (*id.* at 45).

SUMMARY OF ARGUMENT

Petitioners must show a deprivation by respondents of a right secured by the Constitution, not just a tort that may be cognizable under state law, in order to prevail. Specifically, petitioners must show that respondents deprived Joshua DeShaney of liberty or property without due process of law. In an effort to identify a constitutional violation, they rely on two theories: (1) that Joshua DeShaney had a constitutional right, based on the importance of a child's safety and the relationship between the child and a child protection agency, to a minimum level of protection of his personal security; and (2) that respondents disobeyed state law, which petitioners regard as a form of deprivation of a due process entitlement to the benefit of that law.

A. Randy DeShaney, not respondents, deprived Joshua DeShaney of his liberty. An expansive interpretation of the word "deprive," which would cover respondents' *failure to prevent* that deprivation, is contrary to the historical purpose of the Due Process Clause. That Clause was intended to prevent the arbitrary exercise of the powers of government; to prevent affirmative abuses of power; and to bar government oppression. Petitioners seek to recover not because they have suffered from any such arbitrary exercise of power, abuse of power, or oppression, but because the power of government was *not* used to save Joshua DeShaney from his father. Any duty to use that power, however, derives from the common law and not the Due Process Clause.

In particular, the Clause is not a plausible source of duties to provide social welfare services. It was designed

to protect the individual from the things an overzealous government might do to him, not to guarantee services that were virtually unknown when the Fourteenth Amendment was adopted. Nor should the Clause be interpreted to regulate the competence with which such services are provided once the state elects to provide them. That is the classic function of tort law, not a plausible function of a Clause explicitly worded so as to protect against government deprivations.

Although this Court has found in the Due Process Clause mandatory duties to provide services in certain contexts, those contexts are ones in which the state has already deprived the individual of liberty. Prisoners and institutionalized mental patients have constitutional rights to minimum protective services because the state cannot fail to provide such services as an incident to depriving them of their liberty, not because the failure is itself a deprivation of liberty. Thus, most courts of appeals have interpreted the Due Process Clause to apply to state inaction only when it is the state itself that has put the person in a position of danger. The contrary holding of a divided panel of the Third Circuit, and dicta of the Fourth Circuit, have been rejected by several courts of appeals and should be rejected by this Court. The Court also should not constitutionalize duties to provide social services merely because the State may have precluded others from providing such services. Such a ruling would create sweeping new potential for government liability and would lose sight of the fundamental purpose of the Due Process Clause to prevent the misuse of power, rather than to compel its use.

B. Petitioners' contention that Joshua DeShaney had a federal constitutional right to have respondents comply with state law is without merit. This Court has rejected such wholesale translation of state law into federal constitutional law in the past and should continue to do so. The cases on which petitioners rely are *procedural* due

process cases that hold that state law can define the entitlements that a State may not take away without providing fair procedures. Petitioners have not challenged the adequacy of the relevant Wisconsin procedure (its tort law), and the cases on which they rely do not stand for the much broader proposition that state law itself is enforceable through the federal Constitution.

ARGUMENT

RESPONDENTS DID NOT "DEPRIVE" JOSHUA DeSHANEY OF LIBERTY OR PROPERTY WITHIN THE MEANING OF THE DUE PROCESS CLAUSE

The question presented in this case is not whether petitioners should have a remedy for respondents' inaction in the face of evidence suggesting a need to protect Joshua DeShaney from his father. That question is of the sort that the law of torts has addressed for centuries. This case presents the different question whether the *Constitution* was violated by respondents' inaction. Tort-law concepts have little, if any, utility in answering that question, for this Court has repeatedly emphasized that "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker* v. *McCollan,* 443 U.S. 137, 146 (1979); accord *id.* at 142; *Daniels* v. *Williams,* 474 U.S. 327, 332 (1986); *Parratt* v. *Taylor,* 451 U.S. 527, 544 (1981); *id.* at 549 n.7 (Powell, J., concurring in the result); *Martinez* v. *California,* 444 U.S. 277, 285 (1980); *Paul* v. *Davis,* 424 U.S. 693, 701 (1976). The Court has emphatically "rejected reasoning that 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever system may already be administered by the States' " (*Daniels* v. *Williams,* 474 U.S. at 332 (quoting *Paul* v. *Davis,* 424 U.S. at 701)).

Petitioners' constitutional claim under Section 1983 depends on whether respondents can be said to have disobeyed the constitutional command "nor shall any State deprive any person of life, liberty, or property, without due process of law" (U.S. Const. Amend. XIV, § 1). Petitioners seek to fit their claim within the terms of the Clause in two ways. First, they argue that respondents violated the Constitution by allowing Randy DeShaney to take from Joshua his liberty interest in personal security that is protected against state deprivation by the Due Process Clause (see *Ingraham* v. *Wright,* 430 U.S. 651, 673 (1977))—an "interest in freedom from bodily harm" (*Daniels* v. *Williams,* 474 U.S. at 341 (Stevens, J., concurring in the judgment)). Second, petitioners argue (Pet. Br. 24-29) that the Wisconsin Children's Code, Wis. Stat. Ann. §§ 48.01 *et seq.* (West. 1987), gives children such as Joshua DeShaney an entitlement—a form of "liberty" or "property"—to receive social welfare services in accordance with the terms of the statute, and that a failure to comply with any portion of the statute therefore constitutes a "depriv[ation]" of that interest that is proscribed by the Constitution. We submit that neither theory is correct.

A. Respondents Did Not Deprive Joshua DeShaney of His Liberty Interest in Personal Security

We begin by stating the obvious: Respondents did not inflict the beatings that deprived Joshua DeShaney of his liberty interest in personal security. Randy DeShaney did. Like the parolee responsible for the murder at issue in *Martinez* v. *California, supra,* Randy DeShaney "was in no sense an agent of [respondents]" (444 U.S. at 285) when he subjected Joshua to terrible abuse. Thus, in the sense in which the word is ordinarily and naturally used, respond-

ents did not "deprive" Joshua DeShaney of personal security.[2]

"Historically, [the Fourteenth Amendment] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property. * * * This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, * * * was intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels* v. *Williams,* 474 U.S. at 331 (citations and internal quotation marks omitted). Petitioners cannot claim that respondents made any deliberate decision to harm Johsua DeShaney or arbitrarily exercised the powers of government. Instead, petitioners seek redress because respondents allegedly *failed* to exercise the powers of government to save Joshua DeShaney in a situation in which, viewing the record in the light most favorable to petitioners, it may have been egregiously wrong not to do so. If "we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power' "

[2] See *Archie* v. *City of Racine,* 847 F.2d 1211, 1215 (7th Cir. 1988) (en banc) ("Giese did not deprive DeLacy of her life. Emphysema and pneumonia did that."); *Bradberry* v. *Pinellas County,* 789 F.2d 1513, 1518 (11th Cir. 1986) ("The state did not kill Kenny Ray Thomas, the ocean did."); *Estate of Gilmore* v. *Buckley,* 787 F.2d 714, 720 n.10 (1st Cir.) ("[I]f state officials (absent 'special circumstances' * * *) do no more than act erroneously—even if the error is egregious—and the killer is not an officer of the state but is a private third party, we think the essential element of the state's having worked a deprivation is missing."), cert. denied, 479 U.S. 882 (1986); *Jackson* v. *Byrne,* 738 F.2d 1443, 1446 (7th Cir. 1984) ("Although there were deaths in this case, the state did not, within the meaning of the Fourteenth Amendment, 'deprive' plaintiffs' decedents of life. The fire killed Santana and Tommy Jackson, government officials did not."); *Estate of Bailey ex rel. Oare* v. *County of York,* 768 F.2d 503, 513 (3d Cir. 1985) (Adams, J., dissenting).

(*Daniels* v. *Williams,* 474 U.S. at 330, quoting *Parratt* v. *Taylor,* 451 U.S. at 549 (Powell, J., concurring in the result)), then petitioners' lawsuit most assuredly does not belong in federal court, because it is respondents' non-use of power, not affirmative abuse of power, that petitioners assert is a violation of the Constitution. If petitioners' argument were correct the holding of *Daniels* that the Due Process Clause is not generally violated by negligent or inadvertent impositions but principally by intentional ones would be rendered nugatory in a class of case that bears even less relation to the Due Process Clause than those where the defendant official actually though unintentionally inflicts the harm. For in most cases of omissions the harm comes about, not because state officials intended it, but because they *neglected* to prevent it, a case that would seem to raise if anything less of a due process concern than *Daniels.*[3]

[3] The Court need not pause long over the argument of amici the American Civil Liberties Union Children's Rights Project, et al., that there is no relevant distinction between action and inaction, or omission and commission, for purposes of determining the requirements of the Due Process Clause (Br. 46-52). That argument is squarely contrary to the reasoning of the Court in *Daniels* v. *Williams, supra.* Furthermore, even if amici could succeed in showing that there are situations in which it is difficult to distinguish between a claim that the state's action violated the Constitution and a claim that the state's failure to act violated the Constitution, such a showing would neither make the action/inaction distinction irrelevant nor obscure in any way the pellucid fact that the delicts alleged in this case all consist of respondents' inaction in the face of circumstances calling for action, rather than the opposite. As the Court said in addressing a similar argument in *Daniels* v. *Williams*—that negligence should not be distinguished from intent—"the difference between one end of the spectrum * * * and the other * * * is abundantly clear" (474 U.S. at 335).

Petitioners do not seek to use the Due Process Clause to "bar[ ] certain government actions regardless of the fairness of the procedures used to implement them * * * [and thus] prevent governmental power from being 'used for purposes of oppression.' " *Daniels* v. *Williams,* 474 U.S. at 331 (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 59 U.S. (18 How.) 272, 277 (1856)). Rather, they seek to use the Due Process Clause to *require* certain government actions and thus to insist on a use of governmental power to relieve persons from the dangers posed by others in society. That may be a noble goal, and a proper objective of state tort law. But it is not the case that "all common-law duties owed by government actors were somehow constitutionalized by the Fourteenth Amendment" (*Daniels* v. *Williams,* 474 U.S. at 335).

That is particularly true of any possible duty to act with minimum competence in providing social welfare services. This Court has stated explicitly that, "[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its border." *Youngberg* v. *Romeo,* 457 U.S. 307, 317 (1982) (citing *Harris* v. *McRae,* 448 U.S. 297, 318 (1980); *Maher* v. *Roe,* 432 U.S. 464, 469 (1977)). "The Due Process Clause is phrased in the negative. It says that a state shall not 'deprive' residents of life, liberty, or property, save with due process. It does not require the state to furnish residents with property they lack, or ensure that they do not suffer loss at private hands." *Archie* v. *City of Racine,* 847 F.2d at 1220. "The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic government services." *Jackson* v. *City of Joliet,* 715 F.2d 1200, 1203 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984).

It is no answer to say that the Constitution, while imposing on the States no duty to provide social welfare services, nevertheless regulates the care with which such services are provided once the State elects to provide them. The constitutional guarantee is that the State will not—through social welfare services or any other means—"deprive any person of life, liberty, or property, without due process of law." By no feat of alchemy can that constitutional guarantee be transmuted into an assurance that the State, once it undertakes to protect against certain deprivations caused by persons other than agents of the State, will not permit any such deprivation that a competent performance of the State's undertaking would have prevented. Any such assurance is a feature of tort law that has nothing to do with the words used in or the purpose of the Due Process Clause. See *Bradberry* v. *Pinellas County,* 789 F.2d 1513, 1517-1518 (11th Cir. 1986); *id.* at 1516-1517 (citing *Jackson* v. *City of Joliet,* 715 F.2d at 1205); *Wideman* v. *Shallowford Community Hosp., Inc.,* 826 F.2d 1030, 1037 (11th Cir. 1987).[4]

This straightforward reading of the Due Process Clause is consistent with the cases in which this Court has interpreted the Clause to require the provision of particular

---

[4] The concluding observations made by the First Circuit in a similar case are pertinent here (*Estate of Gilmore* v. *Buckley,* 787 F.2d at 722-723):

> Enormous economic consequences could follow from the reading of the fourteenth amendment that plaintiff here urges. Firemen who have been alerted to a victim's peril but fail to take effective action; municipal ambulances which, when called, arrive late; and myriad other errors by state officials in providing protective services, could all be found to violate the Constitution. It would seem appropriate that the citizenry, acting through state legislatures and state courts, should determine how far it wishes to go in reimbursing claims of this type.

services in particular settings. The common feature of all such cases is that the State has *already* deprived the individual of his liberty before any duty arises, and it is entirely compatible with the language of the Due Process Clause, and its historical purpose to prevent affirmative abuses of government power, to hold that the deliberate, state-inflicted deprivation of liberty that has already occurred goes too far when it is accompanied by neglect of the individual's basic needs. For example, institutionalized mental patients have a right under the Due Process Clause to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint" (*Youngberg* v. *Romeo,* 457 U.S. at 319) specifically because the individual is "institutionalized * * * and wholly dependent on the State" (*id.* at 317). To recognize such a right is not to suggest that those whom the State has never previously deprived of liberty can insist that a State's failure to save them from harm inflicted by third persons is itself a deprivation of liberty within the meaning of the Due Process Clause.

Likewise, any due process right to medical care that may belong to prisoners and others involuntarily in state custody (see *West* v. *Atkins,* No. 87-5096 (June 20, 1988) (Scalia, J., concurring in part and concurring in the judgment); cf. *Estelle* v. *Gamble,* 429 U.S. 97 (1976) (Eighth Amendment)) stems from the fact that the State has already deprived them of liberty. The denial of medical care itself, unaccompanied by any other deprivation of liberty, is not itself a deprivation of liberty. And, if prisoners have any due process right to be protected from assaults by other prisoners when the failure to prevent the assault amounts to more than negligence but less than an intentional tort—an issue this Court has not decided (see *Daniels* v. *Williams,* 474 U.S. at 334 n.3; *Davidson* v. *Cannon,* 474 U.S. 344 (1986))—then, again, the logical

basis for that right is that imprisoning a person and exposing him to an accompanying risk of violence that he is, by virtue of his imprisonment, unable to avoid, and that the State (in some aggravated way) neglects to prevent, is too great a deprivation for the Constitution to tolerate. See also *Davidson* v. *Cannon,* 474 U.S. at 355 (Blackmun, J., dissenting) (emphasis added) ("where the State *renders* a person vulnerable and strips him of his ability to defend himself, an injury that results from a state official's negligence in performing his duty is peculiarly related to the governmental function").

The lesson that most of the courts of appeals have correctly drawn from the Constitution itself and from this Court's cases is that a tort, in order to rise to the level of a violation of the Due Process Clause, must at a minimum involve some action of the state that creates the victim's predicament, and not just inaction in the face of a predicament that is not of the state's making. Only if the state has placed the individual in a position of danger can it be said to have deprived him of life, liberty, or property. Thus, whether or not their reasoning and results are ultimately correct, cases such as *Doe* v. *New York City Dep't of Social Services,* 649 F.2d 134 (2d Cir. 1981), after remand to district court, 709 F.2d 782, cert. denied, 464 U.S. 864 (1983), and *Taylor ex rel. Walker* v. *Ledbetter,* 818 F.2d 791 (11th Cir. 1987) (en banc), petition for cert. pending, No. 87-521, are not contrary to the decision below. Those cases are at least arguably consistent with the rule that the state violates the Due Process Clause only by acting so as to deprive a person of liberty, and not merely by passively allowing a third party to deprive someone of liberty. In each of those cases, the state had taken the affirmative step of placing the child in the care of the child's eventual abuser. In the present case, respondents took no such affirmative step; they merely failed to remove Joshua

DeShaney from his father's preexisting custody. Likewise, numerous courts of appeals have endorsed the principle, stated repeatedly by the Seventh Circuit,[5] that duties to protect a person arise under the Due Process Clause only when "the state itself has put [that] person in danger." *Escamilla* v. *City of Santa Ana,* 796 F.2d 266, 269 (9th Cir. 1986); see *Wood* v. *Ostrander,* No. 87-3924 (9th Cir. July 13, 1988), slip op. 8555 & n.5; *Wideman* v. *Shallowford Community Hosp., Inc.,* 826 F.2d 1030, 1035, 1037 (11th Cir. 1987); *Ketchum* v. *Alameda County,* 811 F.2d 1243, 1247 (9th Cir. 1987); *Washington* v. *District of Columbia,* 802 F.2d 1478, 1481-1482 (D.C. Cir. 1986); *Bradberry* v. *Pinellas County,* 789 F.2d 1513, 1517 (11th Cir. 1986); *Estate of Gilmore* v. *Buckley,* 787 F.2d 714, 722 (1st Cir.), cert. denied, 479 U.S. 882 (1986); see also *Rankin* v. *City of Wichita Falls,* 762 F.2d 444, 449 (5th Cir. 1985).

This Court should specifically reject—as the First, Seventh, Eighth, and Eleventh Circuits have specifically rejected[6]—the notion espoused by a divided panel of the

---

[5] Pet. App. 43-44; *Archie* v. *City of Racine,* 847 F.2d at 1222-1223; *id.* at 1226 (Posner, J., concurring); *Walker* v. *Rowe,* 791 F.2d 507, 511 (7th Cir.), cert. denied, 479 U.S. 994 (1986); *Ellsworth* v. *City of Racine,* 774 F.2d 182, 185 (7th Cir. 1985), cert. denied, 475 U.S. 1047 (1986); *Beard* v. *O'Neal,* 728 F.2d 894, 899-900 (7th Cir.), cert. denied, 469 U.S. 825 (1984); *Jackson* v. *City of Joliet,* 715 F.2d at 1204-1205; *Bowers* v. *DeVito,* 686 F.2d 616, 618 (7th Cir. 1982) ("If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."); see also *White* v. *Rochford,* 592 F.2d 381 (7th Cir. 1979).

[6] *Estate of Gilmore* v. *Buckley,* 787 F.2d at 721-722; *Archie* v. *City of Racine,* 847 F.2d at 1223; Pet. App. 44-45; *Harpole* v. *Arkansas Dep't of Human Services,* 820 F.2d 923, 926 (8th Cir. 1987); *Wideman* v. *Shallowford Community Hosp., Inc.,* 826 F.2d at 1035-1036.

Third Circuit in *Estate of Bailey ex rel. Oare* v. *County of York,* 768 F.2d at 510-511, and by dicta in *Jensen* v. *Conrad,* 747 F.2d 185, 190-194 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985), that a tort suit for government inaction becomes a tenable claim under the Due Process Clause when the state undertakes to protect against, but did not create, the danger to a specific individual. This approach promotes an indefinite array of state-law services into constitutional rights by first affixing the label "special relationship," and then broadly construing that label to include as a beneficiary of constitutional protection anyone whose danger is known to a state actor whose job involves protection against that danger. In that way, it conveniently distinguishes *Martinez* v. *California, supra,* in which the Court gave as one of its reasons for denying relief the fact that the murder victim was no more foreseeably in danger than any other member of the general public (444 U.S. at 285). What this approach does not do, however, is address the concern of the Due Process Clause: to forbid States from *depriving* persons of liberty without due process of law. Instead, this expansive approach provides "a category in which to dump cases when a court would like to afford relief" (*Archie* v. *City of Racine,* 847 F.2d at 1223). It is nothing more than a way to make the Due Process Clause into " 'a font of tort law to be superimposed upon whatever systems may already be administered by the State,' " which is exactly what this Court has said that courts should not do (*Daniels* v. *Williams,* 474 U.S. at 332 (quoting *Paul* v. *Davis,* 424 U.S. at 701)).

Finally, respondents cannot be charged with having deprived Joshua DeShaney of his liberty in the constitutional sense—as opposed to having committed a tort—merely because of the possibility that others might have come to Joshua's aid if respondents had not been assigned by state law the primary or even exclusive role in safeguarding the

welfare of abused children. It is the nature of modern society that citizens look to the government to provide many basic protective services—police services, fire protection, consumer protection, and social services are examples—that might be provided, on an organized or an ad hoc basis, by others if the government did not provide them.[7] To treat that fact as a sufficient reason to hold the government liable for a *constitutional* violation, whenever it falls short (or far short) of standards for the reasonable performance of that function, would go a long way to nullify the principle that not every tort committed by a government actor is a violation of the Due Process Clause.[8] Whether a particular power (such as the power to intervene on behalf of abused children) is possessed ex-

[7] Thus, as the Seventh Circuit observed in *Jackson* v. *Byrne*, 738 F.2d at 1447, in holding that the City of Chicago and its officials could not be held liable for the deaths caused by a fire that the City failed to prevent, and did not assist striking firefighters to prevent,

> We are not unmindful of the argument that the city acquired a constitutional duty to provide services once it established itself as the provider of fire protection and thereby lessened the incentive for private citizens to protect themselves. The same theory, however, would lead to liability when a state takes on the task of removing the criminally insane from society and then releases a lunatic who has not been cured of his propensity for violence, *see Bowers* [v. *DeVito*], *supra*, or when a municipality sets speed limits for train traffic at railroad crossings and then refuses to enforce its own train speed ordinance, *see Hull v. City of Duncanville*, 678 F.2d 582 (5th Cir.1982). In neither case did the governmental unit deprive a victim of life by omitting to perform a constitutionally cognizable duty. We decline today to break with the *Bowers* and *Hull* line of reasoning. To do so would open the way for scrutiny by the federal courts of virtually every municipal decision to reallocate protective resources. Neither the Fourteenth Amendment nor Section 1983 was meant to give the federal courts such a role. *See Jackson* [v. *City of Joliet*, 715 F.2d] at 1204.

[8] Indeed, even under tort law this Court has observed, through Justice Brandeis speaking for a unanimous Court, that there is no

clusively by the government or not, the Due Process Clause simply was not intended to *compel* the use of such power but only to prevent its misuse. *Parratt* v. *Taylor*, 451 U.S. at 552 n.10 (Powell, J., concurring in the result). The failure to act when a reasonable person would act is the province of tort law, not the Due Process Clause.

B. Respondents' Alleged Violations of State Law Do Not Constitute Violations of the Due Process Clause

Petitioners' alternative theory (Pet. Br. 24-29)—that each and every duty imposed on respondents by state statutory law is one whose violation, without more, amounts to a violation of the Due Process Clause and gives rise to a potential federal cause of action—was labeled "obviously frivolous" by former Chief Justice Burger (*Youngberg* v. *Romeo*, 457 U.S. at 330 n.* (Burger, C.J., concurring in the judgment); contra *id.* at 325 (Blackmun, J., concurring)). "[W]ere every substantive right created by state law enforceable under the Due Process Clause, the distinction between state and federal law would quickly be obliterated" (*id.* at 330 n.* (Burger, C.J., concurring in the judgment)).

Indeed, this Court has already rejected petitioners' theory on at least two occasions. In *Snowden* v. *Hughes*,

"substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." *Turner* v. *United States*, 248 U.S. 354, 358 (1919); see also *Bergmann* v. *United States*, 689 F.2d 789, 796 (8th Cir. 1982); *Redmond* v. *United States ex rel. SEC*, 518 F.2d 811, 816 (7th Cir. 1975). Yet, if petitioners' theory were to prevail in this case, then presumably the government's "preemptive" peacekeeping role would lead to a holding that government inaction in the face of strong evidence of the need for action is not just a tort but a Due Process Clause violation giving rise to a substantive right to recover damages under Section 1983 or *Bivens*.

321 U.S. 1 (1944), as in this case, the Court was asked to federalize state law by holding that any violation of state law also constituted a violation of the federal Constitution. The Court rejected any such holding, observing (321 U.S. at 11 (emphasis added; citations omitted)):

> If the action of the Board is official action it is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. Its illegality under the state statute can neither add to nor subtract from its constitutional validity. *Mere violation of a state statute does not infringe the federal Constitution.* And state action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature.

See also *Beck* v. *Washington,* 369 U.S. 541, 554-555 (1962); *Hebert* v. *Louisiana,* 272 U.S. 312, 316 (1926); *Barney* v. *City of New York,* 193 U.S. 430 (1904); *Archie* v. *City of Racine,* 847 F.2d at 1215-1218; *Silverman* v. *Barry,* 845 F.2d 1072, 1079 (D.C. Cir. 1988); *Stern* v. *Tarrant County Hosp. Dist.,* 778 F.2d 1052, 1058-1059 (5th Cir.) (en banc), cert. denied, 476 U.S. 1108 (1985).

More recently, in *Pennhurst State School & Hosp.* v. *Halderman,* 465 U.S. 89 (1984), this Court considered the Eleventh Amendment immunity of state officials against injunctive relief based on violations of state law. The Court found an Eleventh Amendment bar to such relief, observing that "[a] federal court's grant of relief against state officials on the basis of state law * * * does not vindicate the supreme authority of federal law" and that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how

to conform their conduct to state law" (465 U.S. at 106). Those pronouncements would be most pointless, however, if (as petitioners contend) every violation of state law is also a violation of the Due Process Clause of the Fourteenth Amendment. "If the alchemist's wand can transmute a violation of state law into a violation of the Constitution, *Pennhurst* will be for naught, federal enforcement of state law the order of the day" (*Archie* v. *City of Racine,* 847 F.2d at 1217).

Board of Regents v. *Roth,* 408 U.S. 564 (1972), in no way supports a contrary result. *Roth* and cases relying on it, such as *Board of Pardons* v. *Allen,* No. 86-461 (June 9, 1987), are interpretations of the *procedural* requirements of the Due Process Clause. See *California* v. *Greenwood,* No. 86-684 (May 16, 1988), slip op. 8. They stand for the proposition that state law is one source of "entitlement[s]" that amount to "more than * * * abstract need[s] or desire[s]" (*Roth,* 408 U.S. at 577) and thus cannot be taken away by the state without constitutionally adequate procedures. Once state-law entitlements have been identified, this Court does not enforce the state law giving rise to those entitlements, but rather tests against the federal Constitution the procedures by which the state deprives a person of those entitlements. See, *e.g., Hewitt* v. *Helms,* 459 U.S. 460, 472-477 (1983). Petitioners, however, have

mounted no challenge to the constitutional adequacy of any relevant Wisconsin procedures.[9]

[9] When the deprivation of such entitlements is undertaken by individual state employees allegedly violating state law rather than through procedures sanctioned by the State itself, the relevant procedures to be tested against the Due Process Clause are the State's remedies (generally tort-law remedies) for the deprivation. *Hudson* v. *Palmer*, 468 U.S. 517, 533-534 (1984); see also *Daniels* v. *Williams*, 474 U.S. at 339-340, 342 & n.19 (Stevens, J., concurring in the judgment). Petitioners undoubtedly have cast this case as a federal action precisely because they wish to obtain more redress than is available under Wisconsin law (see Wis. Stat. Ann. § 893.80(3) (West 1983) (limiting recovery in tort actions against governmental agencies and their employees to $50,000); Massachusetts Committee for Children and Youth Br. 37). Petitioners have nowhere argued, however, that the limitation of liability contained in Wisconsin law renders the State's postdeprivation procedures constitutionally inadequate. Nor would such an argument be plausible. Cf. *Daniels* v. *Williams*, 474 U.S. at 342-343 (Stevens, J., concurring in the judgment) (existence of a sovereign immunity defense, barring recovery altogether against public officials, does not make remedial system constitutionally inadequate).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
DONALD B. AYER
Deputy Solicitor General
ROY T. ENGLERT, JR.
Assistant to the Solicitor General
BARBARA L. HERWIG
JOHN S. KOPPEL
Attorneys

AUGUST 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60596

No. 87-154

MOTION FILED
JUN 10 1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOSHUA DESHANEY, a Minor, by his guardian ad litem, and MELODY DESHANEY,

Petitioners,

—v.—

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, WINNEBAGO COUNTY, ANN KEMMETER and CHERYL STELSE,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION CHILDREN'S RIGHTS PROJECT, THE ACLU OF WISCONSIN, LEGAL SERVICES FOR CHILDREN, THE JUVENILE LAW CENTER, BAY AREA COALITION AGAINST CHILD ABUSE, AND THE NATIONAL WOMAN ABUSE PREVENTION PROJECT IN SUPPORT OF PETITIONERS

CHRISTOPHER A. HANSEN
(Counsel of Record)
MARCIA ROBINSON LOWRY
JOHN A. POWELL
STEVEN R. SHAPIRO
HELEN HERSHKOFF
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION CHILDREN'S RIGHTS PROJECT, THE ACLU OF WISCONSIN, LEGAL SERVICES FOR CHILDREN, THE JUVENILE LAW CENTER, BAY AREA COALITION AGAINST CHILD ABUSE, AND THE NATIONAL WOMAN ABUSE PREVENTION PROJECT, FOR LEAVE TO FILE BRIEF AMICUS CURIAE

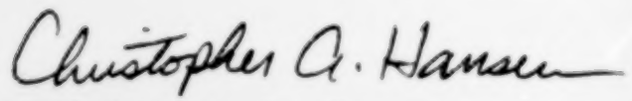
The American Civil Liberties Union Children's Rights Project (ACLU), the ACLU of Wisconsin, Legal Services for Children, the Juvenile Law Center, Bay Area Coalition Against Child Abuse and the National Woman Abuse Prevention Project, hereby move for leave to file the attached brief amicus curiae pursuant to Rule 36.3 of the Rules of this Court. Petitioners have consented to the filing of this brief. Counsel for respondents, however, has been unwilling either to consent to the filing of this brief or to refuse consent.

This case involves important questions about the scope of 42 U.S.C. § 1983 and the constitutional liability of state child

care workers. Each of the amici is concerned with protecting the rights of children and has extensive experience in advocacy on behalf of children, including children such as petitioner who have become the responsibility of the state child protection system. Each of the amici also believe that the decision of the court of appeals denying liability is erroneous. Accordingly, amici respectfully move for leave to file the attached brief amicus curiae in order to present the Court

with our views on this important case.

Respectfully submitted,



Christopher A. Hansen
(Counsel of Record)
Marcia Robinson Lowry
John A. Powell
Steven R. Shapiro
Helen Hershkoff
American Civil Liberties
Union Foundation,
Children's Rights Project
132 West 43 Street
New York, New York 10036
(212) 944-9800

Dated: June 13, 1988

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	5
ARGUMENT	9
I. RESPONDENTS VIOLATED THE PETITIONER'S RIGHT TO SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT	9
A. Respondents In This Case Voluntarily Assumed Extensive Responsibility For Protecting Joshua DeShaney	14
B. The Wisconsin Child Protection System Is Designed To Protect Children Like Joshua Who Are Unable To Protect Themselves, And Its Authority Is So Broad That It Effectively Preempts The Protective Efforts of Others.	19
1. The Wisconsin Child Protection System Is Designed To Protect Vulnerable Children Like Joshua DeShaney	19

Page

2. The State's Authority Is So Broad That It Effectively Preempts The Protective Efforts of Others 28

C. A Fair Balancing Of The Interests Of Children, Families, And The State Supports Recognition Of A Constitutional Right To Personal Security For Children Reported To Child Protection Systems 35

II. LIABILITY DOES NOT DEPEND ON THE IMPOSSIBLE DISTINCTION BETWEEN OMISSION AND COMMISSION 46

III. LIABILITY SHOULD BE AWARDED UPON A FINDING THAT THE RESPONDENTS VIOLATED PETITIONER'S RIGHT TO PERSONAL SECURITY IN A GROSSLY NEGLIGENT MANNER 52

CONCLUSION 61

TABLE OF AUTHORITIES

Page

Cases

Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981) 49

Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972). 49

Bell v. Burson, 402 U.S. 535 (1971). . .50

Bellotti v. Baird, 443 U.S. 622 (1979). 21

Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982). 49, 56

City of Springfield v. Kibbe, 55 U.S.L.W. 4239 (Feb. 24, 1987) 54

Coleman v. Alabama, 827 F.2d 1469 (11th Cir. 1987) 49

Daniels v. Williams, 474 U.S. 327 (1986). 54, 57, 58

Davidson v. Cannon, 474 U.S. 344 (1986). 54, 55, 57

DiMarzo v. Cahill 575 F.2d 15 (1st Cir. 1978). 48

Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981). 12, 30, 45, 48, 56

Page

Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985) 14, 48

Estelle v. Gamble, 429 U.S. 97 (1976) . . .7, [illegible] 28, 47, 55, 58

Goldberg v. Kelly, 397 U.S. 254 (1970). 50

Hinshaw v. Doffer, 785 F.2d 1260 (5th Cir. 1986). 56

Hutto v. Finney, 437 U.S. 678 (1978). 11, 48

Ingraham v. Wright, 430 U.S. 651 (1977). 11

Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970). 56

Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984). 14, 48-9

Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978). 49

Martinez v. California, 444 U.S. 277 (1980). 14, 18

McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979) 49

Miranda v. Arizona, 384 U.S. 436 (1966). 51

Page

Monroe v. Pape, 365 U.S. 167 (1961) 8, 49, 54

Morrison v. Washington Co., 700 F.2d 678 (11th Cir. 1983), cert. denied, 464 U.S. 864 (1983). 49

Owens v. City of Atlanta, 790 F.2d 1564 (11th Cir. 1986). 56

Parratt v. Taylor, 451 U.S. 527 (1981). 54

Porm v. White, 762 F.2d 635 (8th Cir. 1985) 56

Santosky v. Kramer 455 U.S. 745 (1982). 21, 28

Scheuer v. Rhodes, 416 U.S. 232 (1974). 48

Smith v. Wade, 461 U.S. 30 (1983) 7, 8, 48, 55, 60

Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987). .10, 12, 56

U.S. v. Classic, 313 U.S. 299 (1940) . .48

U.S. v. Leon, 468 U.S. 897 (1984). . 8, 55

Villante v. Dep't of Corr., 786 F.2d 516 (2nd Cir. 1986) 56

Watts v. Laurent, 774 F.2d 168 (7th Cir. 1985). 49

Page

Wellington v. Daniels,
717 F.2d 932 (4th Cir. 1983) 49

White v. Rochford, 592 F.2d 381
(7th Cir. 1979). 49

Wilson v. Attaway, 757 F.2d 1227
(11th Cir. 1985) 49

Withers v. Levine, 615 F.2d 158
(4th Cir. 1980). 49

Youngberg v. Romeo,
457 U.S. 307 (1982). . . . . .passim

Statutes and Regulations

45 C.F.R. Parts 1355-1357. 27

48 Fed. Reg. 23104 et seq... 27

42 U.S.C. § 5101 et seq... 22

42 U.S.C. § 5103 1

42 U.S.C. § 5103(B)(C) 22

42 U.S.C. § 627(2)(C). 27

42 U.S.C. § 670 et seq.. 1

42 U.S.C. § 671(a)(10) 27

42 U.S.C. § 671(a)(15) 26

42 U.S.C. § 671(a)(16) 27

Page

42 U.S.C. § 675(1) 27

42 U.S.C. § 675(5)(A). 27

42 U.S.C. § 675(5)(B). 27

Wisc. Stat. § 48.01(1)(e). 26

Wisc. Stat. § 48.40 et seq.. 28

Wisc. Stat. § 48.245 . . . . . .16, 24, 26

Wisc. Stat. § 48.245(7). 40

Wisc. Stat. § 48.345 26

Wisc. Stat. § 48.981 19

Wisc. Stat. § 48.981(1). 24

Wisc. Stat. § 48.981(2). 23, 25, 34

Wisc. Stat. § 48.981(3)(a) 36

Wisc. Stat. § 48.981(3)(c)(1). . . .23, 39

Wisc. Stat. § 48.981(3)(c)(3). 24

Wisc. Stat. § 48.981(3)(c)(5). .24, 25, 40

Legislative History

Cong. Globe, 42d Cong., 1st Sess.
at 85. 50

Other Authorities

Actionable Inaction: Section 1983 Liability for Failure to Act, 55 U. Chi. L. Rev. 1048 (1986). 10

Besharov, Defending Child Abuse and Neglect Cases. 40

Child Welfare League of America, Standards for Child Protective Service (1960) 38

Child Welfare League of America, Standards for Child Protective Service (1973) 38, 39, 40

Kinard, Mental Health Needs of Abused Children, Vol. LIX, Child Welfare 451 (September/October 1980) 30

Kirkpatrick, Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement, 46 Cin. L. Rev. 45 (1977). 56

Mushlin, Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect, 23 Harv. C.R.-C.L. L. Rev. 199 (Winter 1988). 13, 43

Page

National Center on Child Abuse Prevention Research, Child Abuse Fatalities Remain High: Results of the 1987 Annual Fifty State Survey (March 1988). 44

Note, Municipal Liability Under Section 1983: The Failure to Act as "Custom or Policy," 29 Wayne L. Rev. 1225 (1983) 49

Social Work with Abused and Neglected Children (ed. Faller 1981) 29

Stein, "An Overview of Services to Families and Children in Foster Care," Foster Children in the Courts, ed. Hardin, American Bar Association (1983). 38

Wald, State Intervention on Behalf of Neglected Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623 (1976). 38

Wasserman and Rosenfeld, Decision-Making In Child Abuse and Neglect, LXV Child Welfare 515 (Nov.-Dec. 1986) 30

INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States. The ACLU of Wisconsin is one of its state affiliates.

The ACLU has long maintained a Children's Rights Project to defend and protect the constitutional guarantees to which children are entitled under law. The Children's Rights Project represents children in the child welfare systems of a number of states in litigation to enforce federal child welfare statutes (e.g., 42 U.S.C. § 670 et seq. and 42 U.S.C. § 5103), and to ensure that the basic rights of children affected by state child welfare systems are protected. This case involves one component of child welfare, the child

protective system. The ACLU believes that the state's child welfare decisions can and should be subject to the same constitutional principles that constrain or compel government conduct in other contexts. In addition, this case raises questions about the scope of § 1983 that affect numerous ACLU lawsuits around the country.

Legal Services for Children, Inc., is a private, nonprofit law firm founded in 1975 solely to represent minors in juvenile court and other proceedings affecting the health, education, and welfare of minors. Legal Services for Children is based in San Francisco, California, and has participated in numerous cases affecting children, including Honig v. Doe, 108 S. Ct. 592 (1988).

The Juvenile Law Center (JLC) is a public interest law firm that has provided

free legal services to children in Pennsylvania since 1975. JLC has represented hundreds of abused and neglected children in Philadelphia Family Court, and has been involved in federal litigation, at trial and appellate levels, aimed at vindicating the rights of children served by county child welfare agencies. In recent years JLC has had a particular emphasis on enforcing P.L. 96-272, the federal Adoption Assistance and Child Welfare Act of 1980, in Pennsylvania.

Bay Area Coalition Against Child Abuse, based in San Francisco, California, is a coalition of agencies and individuals working in and concerned with the area of preventing child physical and sexual abuse and protecting children from such abuse. The Coalition includes such agencies as San Francisco Child Abuse Counsel, San

Francisco Commission on the Status of Women, the Children's Self-Help Project, Child and Adolescent Sexual Abuse Resource Center, the San Francisco Victim Witness Assistance Program, and Passage Ways.

The National Woman Abuse Prevention Project is funded by the Department of Justice and organized to end abuse against women and their children. The Project is based in the District of Columbia and provides education and training for child protection workers and professionals in the area of domestic violence.

SUMMARY OF ARGUMENT

This Court's decisions have frequently recognized a substantive due process right under the Fourteenth Amendment to personal security.[1/] E.g. Youngberg v. Romeo, 457 U.S. 307 (1982). In this case, respondents violated that right by allowing Joshua DeShaney to be seriously harmed after the state undertook to protect his physical safety.

The existence of that right does not and should not depend on whether Joshua was in the formal legal custody of the state or in the state's institutional care. Rather the critical question is whether, as here, the state voluntarily and affirmatively assumed responsibility for the

---

1/ The phrase "personal security" was used by this court in Youngberg, 457 U.S. at 315. In this case, it refers to the limited right to be protected against physical harm.

protection of a specific individual when (1) that individual was unable to protect himself and (2) the state's assumption of responsibility effectively precluded others from protecting him. As a five year old child, Joshua DeShaney was clearly such an individual.

The court below nevertheless ruled in respondents' favor in part because the Constitution is "a charter of negative rather than positive liberties." DeShaney v. Winnebago County Dep't of Soc. Serv., 812 F.2d 298, 301 (7th Cir. 1987). Amici agree that states are not constitutionally compelled to create a child protection system, any more than a state has an obligation to create a mental retardation system. Youngberg v. Romeo, 457 U.S. at 317. However, once the state creates a child protection system and undertakes

responsibility for protecting a particular child, it may be held liable for failure to fulfill that responsibility whether its failure is described as omissive or commissive. Youngberg v. Romeo, 457 U.S. 307 (1982); Smith v. Wade, 461 U.S. 30 (1983); Estelle v. Gamble, 429 U.S. 97 (1976). This is especially true because the distinction between action and inaction is ultimately illusory.

Finally, this Court need not reach the question of whether gross negligence (or something less than intent) is sufficient to establish liability for a violation of substantive due process because that question was not reached by the courts below. See n.15, infra. If the Court does reach that question, it should hold that respondents' gross negligence can and should give rise to constitutional

liability. This Court has previously found that gross negligence (or something less than intent) is sufficient for liability under § 1983 in cases alleging violations of the Fourth and Eighth Amendments. U.S. v. Leon, 468 U.S. 897 (1984); Monroe v. Pape, 365 U.S. 167 (1961); Estelle v. Gamble, 429 U.S. 97 (1976); Smith v. Wade, 461 U.S. 30 (1983). There is no basis in logic or law to deny similar liability when the Fourteenth Amendment has been violated instead. Indeed, strong policy considerations favor acknowledgement of a right to recover damages upon a showing that respondents violated the Fourteenth Amendment in a grossly negligent manner.

ARGUMENT

I. RESPONDENTS VIOLATED THE PETITIONER'S RIGHT TO SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

The Constitution does not provide a generalized right to safety. Thus, individuals who allege that they were victims of crimes or even abuse that the police or child protection agencies failed to prevent typically have no cause of action under the Due Process Clause.

However, this Court has recognized in a number of contexts that the right to personal security is an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment when the state has undertaken a specific responsibility to assure a specific person's safety.2/

2/ Amici have characterized this right as one of substantive due process. The same right could also be cast in procedural terms. By creating a child protection system with certain mandatory duties to

(continued...)

For example, in Youngberg v. Romeo, 457 U.S. 307 (1982), the plaintiff, a mentally retarded adult, alleged that the state had taken responsibility for ensuring his physical safety and then failed to protect him from physical injury. The Court had little difficulty holding that the plaintiff alleged a violation of the Due Process Clause, stating that the "right to personal security constitutes a 'historic liberty interest' protected by the Due Process Clause." Id. at 315 (citation

---

2/ (...continued)
protect children reported to the state as needing the protection of the applicable child protection laws, the state of Wisconsin created a liberty or property interest in at least those protective steps defined as mandatory by state law. Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (en banc); Actionable Inaction: Section 1983 Liability for Failure to Act, 55 U. Chi. L. Rev. 1048 (1986). The procedures necessary to deprive a child of that interest would be minimal professional decision-making by the agency. See Youngberg v. Romeo, 457 U.S. 307 (1982). By failing to follow those procedures here, the state also violated Joshua DeShaney's right to procedural due process.

omitted). The Court has recognized the same right for prisoners, Hutto v. Finney, 437 U.S. 678 (1978) and students, Ingraham v. Wright, 430 U.S. 651, 672-673 (1977). Moreover, the Court has traced the origin of this right to Article 39 of the Magna Carta. Id. at 673 n.41.

This Court has never held that formal state custody is a necessary predicate to establish the constitutional right to personal security under the Fourteenth Amendment. Thus, the school children whose right to personal security was recognized in Ingraham remained in the legal custody of their parents. Similarly, petitioner's due process claim cannot be defeated merely by noting that the injuries he suffered were not inflicted by state employees. The injuries suffered by Nicholas Romeo were not inflicted by state employees

either; rather, they were inflicted by private individuals living in the institution with him. Youngberg v. Romeo, supra. Finally, the guarantee of personal security does not depend on institutional confinement. Indeed, in Youngberg, the Court emphasized that the right to personal security was not "extinguished by lawful confinement," 457 U.S. at 315, necessarily implying that the right exists outside the context of institutional care. If Nicholas Romeo had been in a state operated group home or a foster home, rather than an institution, his right to personal security would have been the same. Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (en banc), cert. pending, 56 U.S.L.W. 3290 (filed 9/25/87); Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981). See generally Mushlin,

Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect, 23 Harv. C.R.-C.L. L. Rev. 199 (Winter 1988).

Physical or legal custody of a person presumptively triggers the right to personal security because of the degree of responsibility the state has assumed for protecting specific, often vulnerable individuals. For that very reason, however, the existence of a right to personal security in a particular case does not turn on the formal legalisms of custody or confinement, but rather on the degree to which the state has assumed responsibility for the protection of a specific individual when that individual -- here a small child -- is unable to protect himself and the state's assumption of responsibility

effectively precludes others from protecting him.

Applying these substantive due process principles, at least two courts of appeals have concluded that the state should be liable for its failure to protect children, like Joshua DeShaney, who it agreed to protect from physical injury. Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985); Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984). See also Martinez v. California, 444 U.S. 277 (1980).

A. Respondents In This Case Voluntarily Assumed Extensive Responsibility For Protecting Joshua DeShaney

There is no dispute in this case that the State of Wisconsin assumed significant responsibility for Joshua DeShaney's personal security after it learned that there was a serious danger that he might be

beaten by his father. The reasons for that concern are apparent from the record.

Joshua DeShaney was born on March 21, 1979.[3/] In 1980, a Wyoming state court granted custody of him to his father who then moved with Joshua to Wisconsin. As a result of a proceeding initiated by the respondents, Joshua's mother, who remained in Wyoming, was ordered by a Wisconsin court to pay child support. Beginning in 1982 and continuing until his near fatal beating in March 1984, respondents received no fewer than 11 reports that Joshua was being beaten by his father or other adults in his father's home. On at least nine

---

3/ Virtually all of the specific facts of this case are taken from the opinion of the court of appeals, DeShaney v. Winnebago Co., 812 F.2d 298 (7th Cir. 1987). Any additional facts are derived from the case record created by the state child protection agency for Joshua and made part of the record in this case. (See especially memo of A. Kemmeter, dictated 3/11/84 and transcribed 3/15/84.)

occasions, respondents personally saw or were advised of specific injuries including cigarette burns, lacerations, and bruises. At least four of these incidents, prior to Joshua's final injury, were sufficiently serious that Joshua was taken to the hospital.

In response to one of the first reports of abuse, respondents took Joshua into state custody in 1983. He remained in custody for approximately three days. Upon his release, respondents were sufficiently concerned about the likelihood that Joshua would be abused again that they insisted that his father contract with them for a period of supervision and services pursuant to Wisc. Stat. § 48.245. One of the primary purposes of the contract was to ensure that Joshua not be injured again. Accordingly Joshua's father agreed to the

state's demand to enroll him in a Head Start program so that there would be other adults who could monitor the situation. As respondents were aware, he failed to do so.

Respondents, in turn, agreed in the contract to visit the Deshaney home on a periodic basis and to provide Joshua with further protection if there were additional evidence of child abuse. Pursuant to that agreement, respondent Kemmeter, a case-worker with the child protection system, did visit the home on numerous occasions. While there, she repeatedly observed physical signs of abuse and assault on Joshua's face and body. Indeed, the injuries were sufficiently serious that she later said she had expected Joshua would be killed by his father. Nevertheless, she took no action to protect the young child.

In March 1984, Joshua's injuries became so acute he went to the hospital again. The cumulative effect of his repeated injuries was such that he now suffers from severe brain damage.4/

4/ The district court did not address the question of causation. The court of appeals found that the state could not have "caused" the harm to Joshua by arguing that if the child protection agency had not existed, he would still have been hurt. DeShaney, 812 F.2d at 302. Such an argument confuses two concepts. The state had no duty to create a child protection agency and if it had not created one, it could not be said to have caused Joshua's injuries. However, the state did create such an agency. The agency undertook to protect Joshua. The agency knew Joshua was in danger. The agency had the authority to remove Joshua from his father but did not do so and even the court of appeals found its failure to be "reckless." Id. at 303. Others relied on the agency to protect Joshua. It is these four factors -- knowledge of the specific danger to a specific person who cannot protect himself, authority to protect that person, preemption of authority by others to protect the person, and assumption of responsibility to protect that person -- that distinguish this case from Martinez v. California, 444 U.S. 277, 285 (1980), and justify a finding that the state "caused" the deprivation. If the agency had removed Joshua, or taken any number of other reasonable steps such as ensuring that Joshua's father did live up to his contract to

(continued...)

B. The Wisconsin Child Protection System Is Designed To Protect Children Like Joshua Who Are Unable To Protect Themselves, And Its Authority Is So Broad That It Effectively Preempts The Protective Efforts of Others

1. The Wisconsin Child Protection System Is Designed To Protect Vulnerable Children Like Joshua Deshaney

Wisconsin, like every other state, has created a child protection system whose sole purpose is to protect children from prospective physical harm inflicted by their custodians. Wisc. Stat. § 48.981.

4/ (...continued)
place Joshua in Head Start where other adults could have protected him, or investigating each of the injuries Joshua suffered as required by law, or increasing supervision of the family as the evidence of abuse mounted, or insisting on seeing Joshua on the last two visits to the home when his increasing danger might have been discovered, then it is entirely possible that Joshua would not have been injured. These "reckless" actions and inactions (see Point II, infra) are sufficient to establish causation. At the very least, because the district court did not address the causation question, this Court should remand for it to express its views on that question.

That system is responsible for accepting reports of possible abuse or neglect, investigating the validity of those reports and taking action to protect children where necessary either by supervising the home or taking the children into custody. Id. In this respect, the state's assumption of responsibility for children in the child protection system is substantially greater than for people in the mental retardation, school, or prison systems. Each of those latter systems is created for many purposes. The mental retardation system is to provide care and habilitation. The school system is to educate. The prison system is to punish, to deter, and to rehabilitate. For each of these systems, the responsibility for ensuring the physical security of the persons affected is an incidental consequence of the other state

purposes. By contrast, the sole purpose of the state's child protection system is to protect children from future physical harm by their own families. The integrity of the family is an important, indeed constitutionally protected interest. Bellotti v. Baird, 443 U.S. 622, 638 (1979); Santosky v. Kramer, 455 U.S. 745, 753, 758-759 (1982). Yet, that interest is overridden, in the child protection system, by the state's sole and compelling interest in protecting children from future physical harm. See Santosky v. Kramer, 455 U.S. 745, 766 (1982) (recognizing the state's "parens patriae interest in preserving and promoting the welfare of the child.")

The Wisconsin child protection system, like the child protection systems of the 46 states that receive federal child welfare funds, is regulated by the federal Child

Abuse Prevention and Treatment Act. 42 U.S.C. § 5101 et seq. That Act requires an adequate system for reporting possible abuse or neglect, and a prompt investigation of the report so that "upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child ..." 42 U.S.C. § 5103 (B)(C). The same statute creates a National Center on Child Abuse and Neglect to provide research, training, technical assistance, study and reports about child abuse. 42 U.S.C. § 5101.

Although child protection systems vary from state to state, they share common features stemming from federal law and well-established social work principles. The Wisconsin system is thus typical. Reports of abuse or neglect can come from anyone, but there are certain people, such

as doctors, teachers or police, who are usually required by state law to report any suspicion of abuse or neglect. Wisc. Stat. § 48.981(2). Once a report is received, the child protection system "shall ... commence an appropriate and thorough investigation" to determine if the child is in need of protection or services. Wisc. Stat. § 48.981 (3)(c)(1). The investigation must begin within 24 hours and include, if possible, observation of or an interview with the child, or both, and a visit to the family, observation of the child while in the family setting, and interviews with the parents, other siblings, neighbors, and the person who made the allegation. Wisc. Stat. § 48.981 (3)(c)(1). This inquiry occurs with or without the consent of the parents. Where a child requires immediate protec-

tion the worker may immediately remove the child from his or her parents. Wisc. Stat. §§ 48.981 (3)(c)(5). Within 60 days, the child protection agency must determine whether abuse or neglect, as defined by the statute, has occurred. Wisc. Stat. §§ 48.981 (1); 48.981 (3)(c)(3).

Because of the importance of protecting children and their unusual inability to protect themselves, the child protection system in Wisconsin, like that in other states, has unusually intrusive power. The state may contact, observe or interview the child alleged to have been abused or neglected at any location without permission from the child's parent. It may compel a family to accept services upon penalty of removal of the children from the home. Wisc. Stat. § 48.245. In the case of Joshua DeShaney, one of the "services"

that the state attempted to compel the family to accept was to force the common law wife and mother to leave the home. DeShaney, 812 F.2d at 300. Commonly required services include the entry by a parent into an in-patient or out-patient therapy program, or agreement to unannounced visits to the home. Usual protections of confidentiality between doctors and patients as well as other professionals and their clients are abrogated. Wisc. Stat. § 48.981 (2). Ultimately the child protection system may remove a child from his parents. Wisc. Stat. § 48.981 (3)(c)(5).

A state responding to an allegation that a child has been abused or neglected has a number of options. It must investigate the report. If it determines the report is valid, it may, without obtaining

legal custody, generally supervise the family while the child is in the home, Wisc. Stat. § 48.245, or it may leave the child in the home but require the family to receive certain services. Wisc. Stat. § 48.245. The state may obtain custody of the child but leave the child in the home. Wisc. Stat. § 48.345. It may remove the child from the home and place him or her out of the home in a foster home,[5/] group

---

5/ Federal and most state laws require that where possible, any needed services be provided to the family as a unit rather than breaking up the family by placing the children in foster care. Wisc. Stat. § 48.01 (1)(e); 42 U.S.C. § 671 (a)(15). The State must make "reasonable efforts" to prevent placement. Id. Services to families that prevent the need for placement are referred to as preventive services. Preventive services can also include placing the child in the state's legal custody while allowing the child to continue to live with the parents. Preventive services are generally voluntary, but can be imposed on the family by court order as the only option to foster care placement. Wisc. Stat. § 48.345.

If preventive services will not be sufficient to protect the child or are otherwise inadequate to

(continued...)

home, or institution. Id. Finally, it may remove the child from the home and seek to terminate the rights of the parents so that the child can be adopted. Wisc. Stat. §

5/ (...continued)
meet the family's needs, it may be necessary to place the child into the foster care system. Children can be placed in individual foster homes, group homes or other small congregate settings, or institutions. The foster homes or congregate settings can be operated by the government directly or by contract with private individuals or agencies supervised by the state. Foster care is supposed to be temporary. The primary goal is to provide such services as are necessary to allow the child to return home.

The federal Adoption Assistance and Child Welfare Act contains detailed requirements regulating foster care in all of the 46 states receiving federal foster care funds. The law requires that there be case planning and case review, that the state provide "proper care" to children in foster care and "assure ... the permanent placement of the child ...," that foster homes and institutions be supervised on the basis of nationally recognized standards, and that children be placed in the least restrictive setting. 42 U.S.C. §§ 671 (a)(16); 675 (1); 675 (5)(B); 675 (1); 627 (2)(C); 671 (a)(10); 675 (5)(A). See also 45 CFR Parts 1355-1357; 48 Fed. Reg. 23104 et seq.

48.40 et seq. See Santosky v. Kramer, 455 U.S. 745 (1982).

2. The State's Authority Is So Broad That It Effectively Preempts The Protective Efforts of Others

In both Youngberg and Estelle, this Court emphasized that the injured plaintiff -- in one case a mentally retarded person and in the other case a prisoner -- had relied completely on the state for his or her protection. Youngberg, 457 U.S. at 317; Estelle, 429 U.S. at 103. A child abuse victim is similarly vulnerable and similarly dependent on the state to provide protection from parental abuse or neglect.

Joshua DeShaney sadly illustrates the problem. He was five years old when the injuries at issue in this case occurred. Obviously, he was unable to protect himself. In this respect, his need to be protected was even greater than that of the

prisoner who, although confined in the institution, can flee the area where abuse is threatened, attempt to persuade the abuser to desist, complain to the authorities, or take a number of other actions to protect himself, none of which were realistically available to Joshua and other children in the same predicament.

Even children much older than Joshua are typically unable to protect themselves from child abuse without the sort of outside assistance that respondents offered in this case and then never provided. Child abuse victims are often very passive as a result of the abuse. They are thus less likely to be able to report abuse. Jones, "Characteristics and Needs of Abused and Neglected Children," Social Work with Abused and Neglected Children (ed. Faller 1981). They are frequently intimidated so

that they will not report abuse. See Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981). They have unusual difficulty forming relationships with peers and adults. Kinard, Mental Health Needs of Abused Children, Vol. LIX, Child Welfare 451 (September/ October 1980). In addition, they are often extraordinarily protective of the abusing parent. Wasserman and Rosenfeld, Decision-Making In Child Abuse and Neglect, LXV Child Welfare 515 (Nov., Dec., 1986).

The tragedy of petitioner's reliance on the state to protect his personal security is compounded by the fact that there were other people who could have intervened to protect Joshua if the Wisconsin child protection system had not asserted its authority for his protection. The first complaint about possible abuse was received

from Joshua's stepmother, who left the home and complained to the police that Mr. DeShaney "hit the boy, causing marks and is a prime candidate for child abuse." DeShaney, 812 F.2d at 299. Nothing was done, despite the mandatory nature of the statute requiring an investigation by the state child protection agency. On at least four other occasions, hospital officials who treated Joshua notified the state child protection system that Joshua was being abused and on at least two of these occasions, there was "no reaction" from that system. DeShaney, 812 F.2d at 300. One additional report of abuse came to the state child protection agency from the police but was not investigated. The contract signed by the state child protection agency and Joshua's father after Joshua's first hospitalization required the father

to enroll Joshua in Head Start so that the program could monitor his safety. He was not enrolled and when the Head Start worker went to the house, she found Joshua had been left alone. She reported this fact to the child protection agency.

In each of these instances, the persons reporting abuse relied on the child protection system to fulfill its mandatory duties and to investigate and protect Joshua. They might have taken additional actions if they had known the Wisconsin authorities would ignore the reports. Indeed, none of these people had the authority to intervene in the DeShaney family because the state had given the exclusive authority for intervention to the child protection system.

In addition, Joshua's mother, who lived in Wyoming, did not have custody of

him and thus could not remove him from the dangerous situation. Even she was required by law to rely, in emergencies and in the first instance, on the child protection system to investigate reports of abuse of her son. The complaint in this case specifically alleges that had Joshua's mother known of the abuse, she would have tried to take steps to protect Joshua (such as seeking a court ordered change in custody). Although her options were limited by the state's preemption of the right to protect Joshua, the state did not even take the minimal step of notifying this mother that her son was being abused. Complaint, ¶30.

The child protection system in Wisconsin and elsewhere imposes reporting requirements on the people most likely to observe child abuse because of their professional relationship to children. Wisc.

Stat. § 48.981 (2). Once a person has reported a case of abuse to the child protection agency required by statute to investigate it, that person has no further authority to act. Instead, the law mandates that the exclusive jurisdiction for further activities necessary to protect children is in the child protection system which has both the resources and the responsibility to protect children -- like Joshua -- who are known to be in danger.

C. A Fair Balancing Of The Interests Of Children, Families, And The State Supports Recognition Of A Constitutional Right To Personal Security For Children Reported To Child Protection Systems

There are three concerns that might be expressed about recognizing a constitutional right to personal security for child abuse victims whom the state has identified and undertaken to protect. None justify the failure to recognize such a right under the circumstances of this case.

First, decisions in the child protective area inevitably involve the exercise of professional judgment. It is important that any rule give sufficient latitude to permit professionals to make the difficult judgments their job requires. Youngberg v. Romeo, 457 U.S. at 323. It would be inappropriate to hold a state professional liable over a disagreement as to how that judgment should have been exercised. Id.

However, it would be equally inappropriate not to hold the same professional liable when the professional's action "is such a substantial departure from accepted professional judgment, practice, or standards that the person responsible actually did not base the decision on such a judgment." Id.

That failure can be measured, as in this case, by generally accepted standards in child protection. The relevant state statute, and often state regulations or policies, contain certain minimum requirements to govern state conduct. For example, in Wisconsin, the child protection agency must initiate an investigation of any allegation of child abuse or neglect. Wisc. Stat. § 48.981(3)(c). The Wisconsin investigation must include an interview with the child. Id. It must be in

accordance with standards established by the department for conducting child abuse and neglect investigations, and it must be "appropriate and thorough." Id. Obviously, the degree of thoroughness called for in a specific case involves the exercise of judgment to which the court should defer. Youngberg v. Romeo, 457 U.S. at 322. But if no investigation of any kind is begun, or if there is no interview with the child, or if the investigator violates other clear standards established by the agency, then it is fair to say that there has been no exercise of professional judgment and liability is appropriate.

Other professional standards are established by national child welfare organizations. The Child Welfare League of America has had standards governing the investigation of allegations of abuse and

neglect for almost 30 years. See e.g., Child Welfare League of America Standards for Child Protective Service (1960); Standards for Child Protective Service (1973) (latter hereinafter CWLA). These standards were developed with the assistance of professional child welfare experts from around the country and are generally accepted in the field as authoritative, minimum standards for child protective investigations. See also Stein, "An Overview of Services to Families and Children in Foster Care," Foster Children in the Courts, ed. Hardin, American Bar Association (1983); Wald, State Intervention on Behalf of Neglected Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623 (1976).

In this case, respondents' actions went far beyond a mistake in judgment. Those actions represent such a substantial departure from professional judgment, practice, or standards that they amount to a failure to exercise any professional judgment.[6/] Respondents received at least five reports of abuse or neglect which were not investigated despite the mandatory requirement that all reports be investigated.[7/] Wisc. Stat. §48.981(3)(c)(1). See CWLA at 21. On at least three additional

---

6/ Petitioner's complaint contains broad allegations concerning departure from professional standards which, because this case proceeded by summary judgment, petitioners have not yet had the opportunity to prove. The facts in the text, however, appear undisputed.

7/ The very first report in 1982 was not investigated. There were two reports from emergency room nurses in November 1983 that were ignored. A Head Start worker found Joshua alone in January 1984. Nothing was done. In September 1983 the police advised the agency that Joshua was being abused. Again, nothing was done.

occasions, the respondent Kemmeter saw injuries to Joshua but did not investigate. The number and nature of the injuries was such that the agency should have at least had him evaluated by competent medical experts to determine the cause of the injuries and considered removing Joshua from his home or utilizing increased in-home supervision that would have protected him. Wisc. Stat. §§ 48.981(3)(c)(5); CWLA at 25; Besharov, Defending Child Abuse and Neglect Cases. There is no evidence that this option was even considered. Joshua's father entered into a contract designed to protect Joshua but, as respondents were aware, did not fulfill the contract. Under state law respondents were required to notify the District Attorney and at least consider removal. Wisc. Stat. §§ 48.245 (7); CWLA at 37-39. This was not done.

Each of these failures, and perhaps others, violated state law and good professional standards.[8/]

There is little danger that recognition of liability under these circumstances would either inhibit or skew professional decision-making under the standard applied by this Court in Youngberg. Damages would be unavailable against a child protective worker who followed the mandatory duties outlined by statute, regulation and policy.[9/] A worker who made a professional judgment would be immune. Only if the worker's actions are so out-

---

8/ For further discussion, see brief of Amicus Curiae Massachusetts Committee for Children and Youth.

9/ This does not amount to the federalizing of state statutes or professional standards. State statutes and professional standards are relevant in the same way they were found relevant by this Court in Youngberg, as a guide for determining when the state employee's are so grossly negligent that they cannot be said to have involved the exercise of professional judgment.

rageous that they amount to a failure to exercise even minimal professional judgment would liability be possible.

The court of appeals in this case was concerned that recognition of the right to safety in this context would cause workers to err on the side of terminating parental rights. This concern, however, reflects a misunderstanding of the child welfare system. The alternative to leaving Joshua in his home was not termination of parental rights, but removal and placement into foster care or other more intensive in-home supervision. See n.5, infra. Even this alternative would not create an incentive for workers to remove children from their families. Workers who have failed to exercise professional judgment in making a decision to remove a child ought to be as liable as the worker here who failed to

exercise professional judgment in not removing Joshua. If the same standards govern failure to remove and improper removal -- i.e., liability is imposed only in the absence of professional judgment -- there should be no incentive for workers to commit either error at the expense of the other.10/

To the contrary, recognizing a constitutional right in these circum-stances would provide a healthy incentive for child protection workers to conform their conduct to a minimally acceptable standard.11/

Child abuse is a serious problem in this

10/ The fear of distorting the decision-making process is further mitigated by the gross negligence standard articulated in Point III, supra.

11/ State tort laws potentially have a similar effect. However, child protective workers in many states have absolute immunity under state law. Mushlin, Unsafe Havens at 245-249.

country. There were an estimated 2.25 million reports of suspected child abuse or neglect in 1987. National Center on Child Abuse Prevention Research, Child Abuse Fatalities Remain High: Results of the 1987 Annual Fifty State Survey (March 1988), at 3. There were an estimated 1132 deaths attributable to child abuse. Id. at 7. Those laws intended to protect children like Joshua are meaningless if they are unenforceable. If § 1983 liability were available, other vulnerable children like Joshua might be saved from physical or sexual abuse.

Finally, the slippery slope argument is not a persuasive reason for denying liability in this case. Amici recognize the attractiveness of custody as a bright line for determining the limits of liability. However, it is a false clarity that

does not reflect the reality child care in this country.12/

A due process right to personal security undoubtedly extends to children in foster care. E.g., Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981). Given the existence of this well-settled right, it is both reasonable and appropriate to hold state officials liable when the state undertakes to protect a particular child known to be at risk of physical harm, when the state's undertaking effectively precludes others from protecting him, and when the state then fails to exercise even minimal judgment in fulfilling its duty. The tragedy

---

12/ The lines of custody are often blurred in the foster care context. For example, foster children may be discharged to their parents on a "trial" basis. In some instances, the child remains in the legal custody of the state and the physical custody of the parents.

of Joshua DeShaney should not be compounded by denying him even the chance for recovery on the facts of this case.

II. LIABILITY DOES NOT DEPEND ON THE IMPOSSIBLE DISTINCTION BETWEEN OMISSION AND COMMISSION

The Seventh Circuit held that because the "Constitution is a charter of negative rather than positive liberties...the state does not have a duty...to protect children from their parents." DeShaney, 812 F.2d at 301. Neither petitioners nor amici quarrel with that proposition. Nonetheless, once the state assumes responsibility for protecting a specific individual who cannot protect himself, it must not do so in a way that causes further harm -- especially when the state's assumption of responsibility effectively precludes others from providing private assistance.

The court was equally incorrect in its broader assertion that the Constitution never protects citizens from the state's failure to act. Not only does the distinction between action and inaction prove illusory in specific cases, it is directly contrary to a series of decisions by this Court.

The right to personal security discussed in Point I is, by definition, a right to be protected from the state's failure to act. In Youngberg, both parties and every member of the Court took as given that Nicholas Romeo had a substantive due process right to receive "adequate food, shelter, clothing, and medical care" while in the state institution. 457 U.S. at 315. Failure to provide that right clearly states a constitutional claim. Similarly, this Court held in Estelle v. Gamble, 429

U.S. at 103 and 106, that the Eighth Amendment was violated by the state's "failure[s]" and "omissions" in providing medical care to inmates. See also Smith v. Wade, 461 U.S. 30 (1983); Hutto v. Finney, 437 U.S. 678 (1978).

In U.S. v. Classic, 313 U.S. 299, 326 (1940), the Court held that the "failure" to run a fair election was a "misuse of power" and unconstitutional. And in Scheuer v. Rhodes, 416 U.S. 232, 241-242 (1974), the Court held that "public officials...who fail to make decisions when they are needed or who do not act to implement decisions when they are made" can be liable.13/

13/ The courts of appeals have found "omission" sufficient to support liability in a wide variety of contexts. DiMarzo v. Cahill, 575 F.2d 15 (1st Cir. 1978); Doe v. NYCDSS, 659 F.2d 134 (2d Cir. 1984); Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985); Jensen v. Conrad, 747 (continued...)

These decisions accurately reflect the legislative history recited in Monroe v. Pape, 365 U.S. 167 (1961). As explained by Senator Edmunds, floor leader for §1983, "state action may consist in executive nonfeasance as well as malfeasance . . . ." Id. at 228. Even more to the point, Senator Edmunds described §1983 as providing a cause of action for denial of constitutional rights "whether the denial

---

13/ (...continued)
F.2d 185 (4th Cir. 1984); Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981); Withers v. Levine, 615 F.2d 158 (4th Cir. 1980); Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983); Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982); Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972); Watts v. Laurent, 774 F.2d 168 (7th Cir. 1985); White v. Rochford, 592 F.2d 381 (7th Cir. 1979); Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978); McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979); Morrison v. Washington Co., 700 F.2d 678 (11th Cir. 1983), cert. denied, 464 U.S. 864 (1983); Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985); Coleman v. Alabama, 827 F.2d 1469 (11th Cir. 1987); Note, Municipal Liability Under Section 1983: The Failure to Act as "Custom or Policy," 29 Wayne L. Rev. 1225 (1983).

be acts of omission or commission . . . ." Cong. Globe, 42d Cong., 1st Sess. at 85.

In many constitutional contexts, the line between omission and commission simply makes no sense. For example, the right to procedural due process is violated only when the state fails to act. No one has a right to a drivers' license, Bell v. Burson, 402 U.S. 535 (1971), or to welfare benefits, Goldberg v. Kelly, 397 U.S. 254 (1970), and thus it is not unconstitutional for the state to deprive someone of those benefits with appropriate procedures. However, if the state deprives someone of a drivers' license or welfare benefits without a hearing, then the state has acted unconstitutionally. Id. It is the failure to provide due process procedures -- the "omission" of those procedures -- that triggers the violation. Id.

Likewise, when the state attempts to use a statement obtained from a suspect who has not been given the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), the violation is not the "commission" of questioning the suspect. There is nothing in the Fifth Amendment that prohibits all questioning. The violation is the state's "omission" in failing to give the required warnings.

Other examples illustrate the impossibility of attempting to define a specific set of facts as omission or commission. When the state violates the Fourth Amendment by searching a home under circumstances in which a warrant is required but does not obtain a warrant, is the violation the "commission" of the search or the "omission" of failing to obtain the warrant? When the state violates

the Equal Protection Clause of the Fourteenth Amendment by granting a benefit to whites only, is the violation the "commission" of granting the benefit to whites or the "omission" of refusing it to blacks?

The illusory attempt to distinguish omission from commission is a diversion from the real issues in this case. If Joshua DeShaney had a right to personal security and the state's failure to protect him was grossly negligent, then liability should be available.

III. LIABILITY SHOULD BE AWARDED UPON A FINDING THAT THE RESPONDENTS VIOLATED PETITIONER'S RIGHT TO PERSONAL SECURITY IN A GROSSLY NEGLIGENT MANNER

Petitioners do not argue that respondents acted negligently. Rather, they argue that respondents' violation of Joshua's right to personal security was

grossly negligent.[14] The Seventh Circuit appears to have accepted plaintiffs' characterization as accurate without discussing its legal significance. 812 F.2d at 303. Assuming this Court even reaches the question, it can and should find that gross negligence is sufficient to establish liability for a violation of substantive due process.[15]

---

[14] It seems of little value to attempt to distinguish the various standards such as gross negligence or deliberate indifference or recklessness. Each formulation describes a state of mind greater than negligence and less than intent.

[15] The district court did not discuss or make findings concerning the defendants' degree of culpability, whether negligent, grossly negligent, or intentional. The court of appeals referred in passing to the actions of defendant Kemmeter as reckless. DeShaney, 812 F.2d at 303. The court of appeals did not find it necessary to address the question of whether gross negligence would suffice to establish liability for a violation of the right to substantive due process. Because neither of the lower courts addressed this question, it would be inappropriate for this Court to address it in the first instance. Rather the Court should remand to

(continued...)

Because § 1983 does not contain any particular state of mind requirement, Monroe v. Pape, 363 U.S. 167 (1961); Parratt v. Taylor, 451 U.S. 527 (1981), the Court must look to the particular constitutional right allegedly violated in determining the requisite degree of culpability. Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986). However, in conducting that inquiry, this Court is not writing on a clean slate.

Four justices have suggested that a city's gross negligence in training its police force is sufficient to establish liability under § 1983. City of Springfield v. Kibbe, 107 S.Ct. 1114, 1121

15/ (...continued)
allow the district court and the court of appeals to make factual and legal findings concerning the necessary degree of culpability.

(1987)(O'Connor, Rehnquist, White and Powell, JJ., dissenting). Three justices have indicated that gross negligence is sufficient to establish a violation of procedural due process. Davidson, 474 U.S. at 349, 358 (Brennan, Blackmun, Marshall, JJ., dissenting). The deliberate indifference standard that applies under the Eighth Amendment is analogous to gross negligence. Estelle v. Gamble, supra. A police officer cannot escape liability under the Fourth Amendment if his search warrant is based on a recklessly false affidavit. United States v. Leon, 468 U.S. 897 (1984). In addition, punitive damages may be recovered in a § 1983 case based on gross negligence. Smith v. Wade, 461 U.S. 30 (1983).16/

16/ The lower federal courts have also accepted gross negligence in a variety of § 1983 contexts.
(continued...)

There is nothing in the language or history of the Due Process Clause to suggest that its provisions can only be violated by a higher degree of culpability than required by the Eighth Amendment, for example. Simply in terms of the constitutional text, the Eighth Amendment prohibits the "infliction" of cruel and unusual punishment, a word suggesting at least as much and perhaps more deliberateness than the reference in the Fourteenth Amendment

---

16/ (...continued)
Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981); Villante v. Dep't of Corr., 786 F.2d 516 (2d Cir. 1986); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982); Hinshaw v. Doffer, 785 F.2d 1260 (5th Cir. 1986); Porm v. White, 762 F.2d 635 (8th Cir. 1985); Owens v. City of Atlanta, 790 F.2d 1564 (11th Cir. 1986); Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987); Kirkpatrick, Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement, 46 Cin. L. Rev. 45, 57 n.64 (1977), and cases cited therein.

to a "depriv[ation]" of liberty or property.

Furthermore, this Court's decisions in Daniels and Davidson are not to the contrary. Unlike Davidson and Daniels, this case alleges a violation of substantive due process, not procedural due process. The Court in Daniels specifically noted that the state of mind requirement might be different depending upon the specific constitutional right alleged to have been violated. Daniels, 474 U.S. at 334. Additionally, the plaintiffs in those cases were arguing for recovery based on simple negligence. The Court explicitly left open the question of whether gross negligence would support liability for a violation of even procedural due process, Daniels, 474 U.S. at 334 n.3.

In Daniels, the Court also expressed its concern about trivializing the Due Process Clause. 474 U.S. at 332-333, which the Court described as a protection against "the arbitrary exercise of the powers of government," id. at 331, quoting Hurtado v. California, 110 U.S. 516 (1884), and a protection from the use of governmental power for the purpose of oppression. Id.

Whatever else may be said about this case, it is hardly trivial. Moreover, when a state employee exercises state power with gross negligence (or recklessness, or deliberate indifference), then it is appropriate to say that the worker's action was not just the inadvertent error of an individual but an abuse of the governmental power delegated to that individual. Estelle v. Gamble, 429 U.S. 97 (deliberate indifference to prisoner's

medical needs is abuse of governmental power); Youngberg v. Romeo, 457 U.S. 307 (failure to exercise professional judgment to protect institutionalized mentally retarded person from physical harm is abuse of governmental power).

In addition, there are strong policy reasons for recognizing a right to sue for grossly negligent actions that violate the right to substantive due process. The prophylactic effect of a rule prohibiting more negligent action would be minimal. However, given the degree of deliberateness implied by a gross negligence standard, recognition of liability could have a prophylactic effect in inducing governmental authorities to conform their conduct to the fundamental fairness represented by the substantive due process doctrine. This Court has previously recognized the

importance of that goal. See Smith v. Wade, 461 U.S. at 49.

For all these reasons, petitioners are entitled to recover if they can establish that the respondents violated their substantive due process right to personal security in a grossly negligent manner.

CONCLUSION

For the reasons stated herein, the decision below should be reversed.

Respectfully submitted,

Christopher A. Hansen
(Counsel of Record)
Marcia Robinson Lowry
John A. Powell
Steven R. Shapiro
Helen Hershkoff
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Dated: June 13, 1988

MOTION FILED
JUN 13 1988

No. 87-154

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSHUA DeSHANEY, a minor,
by his guardian ad litem,
CURRY FIRST, ESQUIRE, and
MELODY DeSHANEY,

Petitioners,

v.

WINNEBAGO COUNTY DEPARTMENT OF
SOCIAL SERVICES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF, AND BRIEF OF MASSACHUSETTS COMMITTEE FOR CHILDREN AND YOUTH, IN SUPPORT OF PETITIONERS

Laura L. Carroll
Counsel of Record
Gene K. Landy
Sally A. VanderWeele
Kim E. Perry
WIDETT, SLATER & GOLDMAN, P.C.
60 State Street
Boston, Massachusetts 02109
(617) 227-7200

June 13, 1988

No. 87-154
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSHUA DeSHANEY, a minor,
by his guardian ad litem,
CURRY FIRST, ESQUIRE, and
MELODY DeSHANEY,

Petitioners,

v.

WINNEBAGO COUNTY DEPARTMENT OF
SOCIAL SERVICES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

MOTION OF THE MASSACHUSETTS COMMITTEE FOR CHILDREN AND YOUTH FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Massachusetts Committee for Children and Youth ("MCCY") respectfully moves, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as amicus curiae.

The petitioners have consented to the filing of this brief. The respondents have neither consented, nor refused consent to the filing.

INTEREST OF MCCY

The Massachusetts Committee For Children and Youth ("MCCY") is a non-profit organization, headquartered in Boston, which has worked for three decades, through advocacy, to improve the lives of Massachusetts' most vulnerable children, including abused and neglected children, foster children, drug-addicted newborns, adolescents facing depression and suicide, abandoned and runaway children, and homeless children and their families.

The Court's decision in this case will have broad implications for the welfare of children. As MCCY has substantial experience and expertise in the field of child abuse, it believes

that its brief can make a contribution of material assistance to the Court. MCCY's brief addresses the characteristics of abusing families, the standard of child abuse investigation and intervention, and the impact the decision in this case will have on the nation's children.

Respectfully submitted,

Laura L. Carroll
Counsel of Record
Gene K. Landy
Sally A. VanderWeele
Kim E. Perry
WIDETT, SLATER &
GOLDMAN, P.C.
60 State Street
Boston, Mass. 02109
(617) 227-7200

June 13, 1988

TABLE OF CONTENTS

Interest of Amicus in the Cause Before the Court 2

Summary of the Argument 3

Argument 5
The Case Below 5
Structure of the Argument 7
The Pattern of Child Abuse 8
The Child Protection System 11
The State's Actions in Joshua's Case Failed to Meet Basic Norms of Case Practice 14

1. Failure to Seek Medical Diagnosis of Joshua's Head Injuries 16

2. Failure to Follow-Up on Injuries to Joshua Inconsistent With His Parents' Description of Their Cause 18

3. Failure to Act When Confronted by Repeated Injuries 20

4. Failure to Reconvene the Child Abuse Team 21

5. Failure to Examine Joshua In Spite of Repeated Injuries 21

6. Failure to Respond to Evidence of Life-Threatening Injury 22

7. Failure to Take Due Account of Further Signs of An Abusive Home 23

8. Failure to Provide Services or to Hold Randy DeShaney to the Terms of His Agreement with the Department 24

9. Failure to Take Any Steps to Protect Joshua 25

The Responsibility of the State for the Plight of the Child 27

Under Well-Recognized Precedents, Plaintiff Should Be Accorded a §1983 Cause of Action 30

The Court Should Adopt An Appropriately Narrow Version of the Special Relationship Test 33

Abused Children Have No Effective Remedy, Other Than Lawsuit 36

The Cause of Action Will Not Unduly Interfere With Social Work Case Practice 38

The Federal Courts Are the Appropriate Forum for This Case 41

Conclusion 42

TABLE OF AUTHORITIES

Cases	Page
Davidson v. Cannon, 474 U.S. 344 (1986)	39
DeShaney v. Winnebago County Department of Social Services, 812 F.2d 298 (7th Cir. 1987)	6,41 42
Doe v. Klein, 599 F.2d 338 (9th Cir. 1979)	42
Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981)	10
Doe v. New York City Department of Social Services, 709 F.2d 782 (2d Cir. 1983)	41-42
Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985)	34
Estelle v. Gamble, 429 U.S. 97 (1976)	39
Hutto v. Finney, 437 U.S. 678 (1978)	31
Ingraham v. Wright, 430 U.S. 651 (1977)	31

Cases	Page
Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984)	34
Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983)	41
Youakim v. Miller, 562 F.2d 483 (7th Cir. 1977)	42
Youngberg v. Romeo, 457 U.S. 307 (1982)	31
United States Constitution	
U.S. Const., Amend. VIII	39
U.S. Const., Amend. XIV	4,6-7,30,31,33
Statutes	
42 U.S.C. §1983	passim
42 U.S.C. §5101, et seq.	12
42 U.S.C. §5103(b)(2)(c)	12
42 U.S.C. §5103(b)(2)(D)	13
42 U.S.C. §5103(b)(2)(E)	37
Wisconsin Children's Code §48.981	13
Wis. Stat. §48.981(7)	37
Wis. Stat. §893.80(3)	37

Regulations	Page
45 C.F.R. §1340.14(f)	13
45 C.F.R. §1340.24(d)	12
Federal Rules of Evidence	
Fed. R. Evid. 701 through 705	15
Other Authorities	
Bommer, Goodgion, Pease and Zmud, Development of an Information System for the Child Abuse and Neglect Service System 13(4), COMMUNITY MENTAL HEALTH JOURNAL (1977)	8-9
Faller, Bowden, Jones and Hildebrandt, Types of Child Abuse and Neglect, SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN (K. Faller ed. 1981)	17-18,19,20
Faller, Ziefert and Jones, Treatment, Planning, Process and Progress, SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN (K. Faller ed. 1981)	29
Jones, Characteristics and Needs of Abused and Neglected Children, SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN (K. Faller ed. 1981)	11

	Page
Kempe, Related Aspects in Child Psychology, CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY (R. Helfer and C. Kempe ed. 1976)	23
Thompson, Civil Suit: An Abused Child's Only Protection, 6 PROBATE LAW JOURNAL (1984)	12
Weston, The Pathology of Child Abuse, THE BATTERED CHILD (R. Helfer and C. Kempe ed. 1974)	17,19

7468 D-3 ko
see 71041

No. 87-154
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSHUA DeSHANEY, a minor,
by his guardian ad litem,
CURRY FIRST, ESQUIRE, and
MELODY DeSHANEY,

Petitioners,

v.

WINNEBAGO COUNTY DEPARTMENT OF
SOCIAL SERVICES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF OF MASSACHUSETTS COMMITTEE FOR CHILDREN AND YOUTH IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS IN THE CAUSE BEFORE THE COURT

The Massachusetts Committee For Children and Youth ("MCCY") is a non-profit organization, headquartered in Boston, which has worked for three decades, through advocacy, to improve the lives of Massachusetts' most vulnerable children, including abused and neglected children, foster children, drug-addicted newborns, adolescents facing depression and suicide, abandoned and runaway children, and homeless children and their families.

The President of MCCY, Dr. Eli Newberger, is the chief of the clinic at Boston's Children's Hospital responsible for treatment of cases of abused and neglected children. Dr. Newberger has written numerous books and articles on the field of child

abuse. Members of MCCY's Board include child advocates and professionals in the child welfare field. MCCY has issued numerous studies in the fields of child welfare, including reports on child abuse prevention, adolescent services, and services for homeless children.

MCCY submits this amicus curiae brief because it believes that a correct interpretation of 42 U.S.C. §1983, as asserted by the plaintiff, will be in the public interest and will benefit abused children.

SUMMARY OF THE ARGUMENT

In this brief, MCCY contends that:

1. The intervention in Joshua's case by the Department and Kemmeter failed to meet fundamental and clearly articulated standards of practice. Under those standards, the facts of the

plaintiff's case support a finding of deliberate indifference toward Joshua.

2. The intervention in Joshua's family life by Kemmeter and the Department profoundly affected the dynamics of the family and, more likely than not, increased the risk to Joshua.

3. Under well-established Fourteenth Amendment precedent the state had a duty to protect the life and bodily integrity interest of the plaintiff.

4. Denial of a claim under §1983 will have the result of leaving Joshua without an adequate remedy.

5. The class of persons to whom §1983 protection should be accorded under the applicable "special relationship" test is narrow, and their need for protection is great.

6. Recognition of the plaintiff's right to proceed under §1983 will not distort social work practice. Rather, it will create an appropriate deterrent to indifference to danger to vulnerable children.

7. Given the nature of the legal and factual issues at stake, the federal courts are the only appropriate forum for this suit to redress a violation of constitutional rights.

ARGUMENT

The Case Below

This case arose from life-threatening injuries inflicted upon four-year-old Joshua DeShaney ("Joshua") by his father Randy DeShaney ("DeShaney"), and from the failure of the Winnebago Department of Social Services (the "Department") and social worker Ann Kemmeter ("Kemmeter") to

make good faith efforts to protect Joshua against such harm. Joshua suffered severe brain damage as a result. He most likely will be institutionalized for life.

Joshua, by his guardian ad litem, and his mother, Melody DeShaney, brought suit against Kemmeter, the Department and Winnebago County. The suit charged the defendants with having deprived Joshua of his liberty without due process of law, in violation of 42 U.S.C. §1983. The United States District Court of Wisconsin dismissed the action on summary judgment. The Seventh Circuit in DeShaney v. Winnebago County Department of Social Services, 812 F.2d 298 (1987), affirmed the dismissal.

MCCY contends that the Circuit Court's opinion was based on an

erroneous view of the facts about child abuse cases in general and this case in particular and represents a misapplication of law under §1983 and the Fourteenth Amendment. The plaintiff has a cognizable claim. As the underlying facts are in dispute, the grant of summary judgment was in error.

Structure of the Argument

The principal issue before the Court is the existence of a Fourteenth Amendment duty of the agents of the state to act in good faith to protect Joshua DeShaney. MCCY will discuss the relevant facts of this case and of child abuse in general and demonstrate that in light of these factors, as discussed herein, a Fourteenth Amendment duty must exist.

Furthermore, MCCY believes that the basic standards of social work

practice for child abuse cases are appropriate for litigation in federal court, with the aid of expert testimony. MCCY will demonstrate, in the context the facts of the case, there was a gross and obvious failure to follow basic criteria of child abuse investigation and intervention.

The Pattern of Child Abuse

Although physical and sexual abuse of children surely dates back to pre-historic times, it is only in recent times that our culture has recognized child abuse as endemic in all human societies.

The pattern of behavior of parents that leads to child abuse has become quite well understood.

> A review of the literature relating to the emotional and personality characteristics of child abusers reveals a recurring pattern. Child abusers

> are often described as immature, self-centered, emotionally starved, and having unmet dependence needs... [M]any abusers feel inadequate or incompetent in their particular role.
>
> Most child abuse incidents occur under conditions of accumulated stress in which the abuser feels overwhelmed and unable to cope with his or her problems... The abuser out of frustration explodes with violence which is directed toward a child in a futile attempt to cope with his or her stressful situation. Any child is a target under these circumstances. [citations omitted]...

Bommer, Goodgion, Pease and Zmud, Development of an Information System for the Child Abuse and Neglect Service System 13(4), COMMUNITY MENTAL HEALTH JOURNAL 333, 334 (1977).

It is hard to imagine any human condition more helpless than that of the abused young child. Children who

are the subject of abuse are totally isolated. They live in a world of terror and pain. Often child abusers successfully intimidate the children into refraining from alerting outside authorities to their plight, even when the children are old enough to do so. See, e.g., Doe v. New York City Department of Social Services, 649 F.2d 134, 138 (2d Cir. 1981).

Toddlers, such as four-year-old Joshua, are especially vulnerable because they rarely have contact with persons or institutions outside the family, except as permitted by their parents. They obviously cannot protect themselves, and they cannot escape from their violent caretakers.

Physical abuse has a profoundly adverse effect on the child's ability to feel and to function as a healthy

human being. Even infants and toddlers are affected by serious abuse, and become conditioned to acceptance of their mistreatment.

> [An] outstanding characteristic of abused infants (and of older children too) is their passive compliance and acceptance of whatever happens to them or is expected of them; ... They appear very stoic, listless, apathetic children who display little affect. It seems that some children learn very young that their best hope of getting food and care in a hostile or chaotic environment where parents are preoccupied with their own needs seems to be total submission to their parents' wishes.

Jones, Characteristics and Needs of Abused and Neglected Children, in SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN 79, 81 (K. Faller ed. 1981).

The Child Protection System

Every state in the United States, the District of Columbia and all United

States territories have child protective service systems. Thompson, Civil Suit: An Abused Child's Only Protection, 6 PROBATE LAW JOURNAL 85, 86 (1984). In all state systems, child abuse reports are followed by investigation by social workers and intervention if appropriate.

The Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101 et seq., enacted in 1974, requires states to have child abuse and neglect reporting laws. In addition, the states are required to provide for prompt investigation to substantiate the accuracy of child abuse reports and must provide immediate action to protect the health and welfare of abused and neglected children. 42 U.S.C. §5103(b)(2)(c); 45 C.F.R. §1340.24(d). This action must include

the provision of emergency services (such as caretaker, homemaker, or medical services; multidisciplinary team review; and appropriate court action) to protect the child. 45 C.F.R. §1340.14(f). See also 42 U.S.C. §5103(b)(2)(D) (requiring adequate training for protective service workers).

The Wisconsin child abuse reporting law is representative of laws in other states, and follows the pattern set forth in the Child Abuse and Treatment Act. The Wisconsin Children's Code, §48.981, requires the Department to respond to reports of child abuse with an immediate investigation when there is reason to suspect that a child's health or safety is in immediate danger. The county department must initiate a diligent

investigation within twenty-four hours of receiving a report and must determine whether the child is in need of protective services. If services are needed, they are to be provided.

The State's Actions in Joshua's Case Failed to Meet Basic Norms of Case Practice

In the case below, the Seventh Circuit concluded that the Department and Kemmeter were not responsible for Joshua's welfare, and did not contribute to Joshua's peril. As will be shown herein, that premise is incorrect.

Moreover, the Circuit Court implied that the standards governing protective service cases are somehow unfit for litigation in a federal court. In fact, the standards are clear, and can be proven to the trier of fact by expert testimony admitted

under Fed. R. Evid. 701 through 705, just as in other cases.

Basic criteria and practices for recognizing and responding to child abuse are the core of the training of a protective service worker. These clear standards were ignored in Joshua DeShaney's case. Indeed, to one familiar with abusing families and children, the case of Joshua DeShaney showed many red flags of serious abuse and of great danger to the child. Kemmeter's own case record shows her awareness of the indicators of abuse and the fact that Joshua was being battered repeatedly. Yet Kemmeter did not take any good faith steps to help and protect Joshua.

1. Failure to Seek Medical Diagnosis of Joshua's Head Injuries

The most important rule of practice which Kemmeter violated in Joshua's case is the need for medical diagnosis of repeated serious traumatic injury. Medical diagnosis is needed both for a reliable analysis and for evidence for court. Such diagnosis should be conducted with the consent of the parents if possible, or under court order if necessary.

As every protective services social worker knows, head injuries are the most dangerous result of child battering, and the most frequent medical cause of child abuse

deaths.[1] In children, "[a]ll head injuries have to be considered as potentially very serious because of possible damage to the brain and central nervous system". Faller, Bowden, Jones and Hildebrandt, Types of Child Abuse and Neglect, in SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN 13, 20 (K. Faller ed. 1981) [hereinafter cited as Types of Child Abuse and

---

[1] See Weston, The Pathology of Child Abuse, in THE BATTERED CHILD 61, 79-85 (R. Helfer and C. Kempe ed. 1974) [hereinafter cited as Pathology]. In a classic study, Weston examined the bodies of twenty-three young children killed by child abuse. Postmortem examination showed that each one had died of a cerebral hemorrhage. In nineteen of the children, repetitive traumatic head injury was obvious from external examination. In a great majority of the cases, the parents' initial story was that the child fell from furniture or down stairs. However, the great majority of the injuries in the study were, in fact, caused by blows from the hand or fist. Id.

Neglect]. Joshua had numerous head injuries which Kemmeter saw throughout her involvement with the case. (App. 104, 114, 117, 119, 121, 130, 131). More head scars and bruises were discovered by the hospital staff when Joshua was brought unconscious to the emergency room on March 8, 1984. (App. 126). These additional injuries would have been discovered and documented earlier if there had been an physical examination of Joshua by a doctor.

2. Failure to Follow-Up on Injuries to Joshua Inconsistent With His Parents' Description of Their Cause

At no time from Joshua's initial hospitalization on January 23, 1984, until his final life-threatening beating on March 8, 1984, did Kemmeter ever seek a medical determination of whether Joshua's injuries were consistent with his father's

description of the harm.[2] On the face of the record, there appear distinct discrepancies noted by Kemmeter between the purported cause of harm to Joshua and his physical appearance. (App. 114). Kemmeter noted on one occasion that Joshua had bruises all over his head and face severe enough to require outpatient treatment at a hospital. This was clearly inconsistent with the supposed cause, a fall in the bathroom of the DeShaney home. (App. 121).

---

2 "There are certain 'red flags' signalling abuse or neglect that are useful for the social worker to understand. First an important indicator is an explanation given by the parents for an injury or condition of the child that does not fit the facts." Types of Child Abuse and Neglect at 13-14. One physician noted: "Confrontation of the parents by the usual obvious disparity between initial presenting story and the evidence as gathered by the medical investigator usually results in a slowly unfolding admission of misconduct." Pathology at 66.

3. Failure to Act When Confronted by Repeated Injuries

Another clear danger sign was Joshua's repeated suspicious injuries. A series of unexplained injuries is a classic indicator of child abuse.[3]

Similarly Kemmeter failed to have a doctor observe the apparent cigarette burns she observed on Joshua's body. (App. 119). Cigarette burns are susceptible of medical diagnosis and are a very common indicator of child abuse.

---

3 "[C]hildren who are harmed intentionally often experience mistreatment repeatedly. They are likely to present with multiple injuries at various stages of healing and scars. While it may be plausible that a child will be injured accidentally a single time in a suspicious manner, it is much less likely that a child will have been injured in such a way several times." Types of Child Abuse and Neglect at 14.

4. Failure to Reconvene the Child Abuse Team

It is also astounding that after the child's second hospitalization for traumatic injury (and the second hospital report of child abuse), Kemmeter failed to reconvene the child abuse team to evaluate the child in the light of the repeated injuries and to devise a plan of action to protect the child.

5. Failure to Examine Joshua In Spite of Repeated Injuries

Kemmeter failed even to see the child at all on at least two of her visits to the DeShaney home. (App. 131, 132). This failure to examine a child at risk is contrary to the most fundamental norms of protective services case practice.

6. Failure to Respond to Evidence of Life-Threatening Injury

On March 7, 1984, the day before Joshua was brought injured and unconscious to the hospital, Kemmeter was informed by Marie, Randy's girlfriend and Joshua's primary caretaker, that Joshua had "fainted in the bathroom several days earlier for no apparent reason." (App. 132). As any protective social service worker must know, unexplained sudden fainting is very unusual for young children. In the context of all the head injuries known to Kemmeter, it was a clear indicator of serious danger to the child's life. Again, Kemmeter took no action; she made no attempt to secure prompt medical attention.

7. Failure to Take Due Account of Further Signs of An Abusive Home

Joshua's repeated injuries occurred in the context of a home that fits a classic pattern of child abuse behavior. Kemmeter's case record indicates that Randy DeShaney and his girlfriend Marie had unrealistically high expectations of Joshua, a sign of emotional immaturity in Randy and Marie, and a classic indicator of an abusive home.[4] (App. 118, 119). Kemmeter knew that Randy was battering Marie and therefore that violence was

---

[4] "Studies of abusive parents have indicated clearly that one of the several major areas of difficulties is their unrealistic and inappropriately high expectation of performance from the child. These expectations often are due to the belief that the child is capable of meeting the parents' emotional needs." Kempe, Related Aspects in Child Psychology, in CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY 64, 69 (R. Helfer and C. Kempe ed. 1976).

occurring in the family. (App. 120). Kemmeter also knew that a Head Start worker had found Joshua home alone, which is strong evidence of neglect. (App. 120). And Kemmeter had heard verbal threats by Randy and Marie against Joshua. (App. 119).

8. Failure to Provide Services or to Hold Randy DeShaney to the Terms of his Agreement With the Department

The handling of Joshua's case showed other serious deficiencies as well. Most important is the fact that nothing was done to improve the dynamics of the family or deal with the family problems that were leading to abuse. No therapy was provided. A written agreement was signed by Randy calling for Randy to receive counseling from the Department -- which he never received. (App. 114, 115). Randy also agreed in writing that Joshua would be

placed in the Head Start program -- an early learning program where Joshua would be seen by his teachers every day. That did not occur either. (App. 120). When Randy failed to abide by any of the terms of the agreement, nothing was done -- either to enforce it or to give Joshua more frequent and more intensive scrutiny.

9. Failure to Take Any Steps to Protect Joshua

As a minimum, Kemmeter should have obtained medical confirmation of the injuries to use as evidence needed to remove Joshua from the home. She did not do so. She could have taken Joshua into emergency custody, but did not do so. She could have taken Joshua's case back to Court, but did not do so. At the least, services should have been provided, including counseling for Randy and Marie, more frequent visits

from a social worker, daily visits from a parent aide[5] or protective day care.[6] On the face of the record, Kemmeter knew Joshua was at great peril (App. 108) and took no steps at all to address the danger to Joshua.

In sum, Kemmeter's handling of the case fell woefully short of the basic standards of child abuse investigation and intervention. Although the current record is not complete, there are certainly sufficient facts to support a

---

[5] Parent aides are trained laypersons who visit abusing homes on a daily basis to assist in parenting and to help defuse family tension. They also monitor behavior toward the child in the home.

[6] Protective day care provides several hours of care daily to abused children. This service allows the child to be observed daily, and allows workers to build a relationship of trust with a child that permits inquiry into the causes of injuries that the child may show.

finding of deliberate indifference on behalf of Kemmeter.

The Responsibility of the State For The Plight of the Child

It is important to note that in a child protection system, the social worker (and his or her supervisors) preempt society's response to the abusive family. As both a legal and a practical matter, only the protective service agency can direct services to the abused child and the family. Other institutions who might intervene to protect a child, such as the police, hospitals, social service agencies, the child's school and church, are all inhibited from acting, because all believe that the social service agency is in charge.

Because the protective service agency has preempted the field, it, in fact, increases the child's isolation,

and thereby increases the danger to the child when its intervention is carried out in an inept and indifferent manner.

In November 1983, Joshua was hospitalized for a second time for a cut forehead, bloody nose, swollen ear, and bruises on both shoulders. The hospital could have sought help from a private agency or gone to the Court to seek protection for Joshua, or they could have contacted the police. Plainly the emergency room personnel did none of these things, because they shared the common belief that as long as abuse is reported to the protective service agency, they have no further responsibility to the abused child.

Moreover, it is well recognized that a seriously flawed intervention, such as that in the case at bar, can increase the threat of harm to the

child. Protective service interventions profoundly affect the dynamics of the family.

> It is crucial that the worker recognize that the protective service and/or treatment interventions may be crisis factors for the family. Thus initially professional involvement may exacerbate the family's problems rather than alleviate them.

Faller, Ziefert and Jones, Treatment, Planning, Process and Progress, in SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN 60, 62-63 (K. Faller ed. 1981).

In the dynamics of an abusing family, the intervention of the social worker must be persistent enough to deter harm, and must be accompanied by support for the family through frequent visits and services. Intervention such as that in Joshua's case, where there was no follow-up and no services at

all, serves only to raise the abuser's sense of anxiety and intensify his feelings of inadequacy, the same feelings that fuel the urge to attack the child.

Under these circumstances, it would be inaccurate as a factual matter to allow the agents of the state to disclaim responsibility for the tragic result of official indifference.

Under Well-Recognized Precedents, the Plaintiff Should Be Accorded a §1983 Cause of Action

The nature of the state's intervention in Joshua's life, the risks that that intervention caused, and the state's assumption of the role of protector of Joshua's welfare all require the state to bear responsibility, under the Fourteenth Amendment, for his life and bodily integrity.

This Court has recognized that one of the liberties protected by the due process clause of the Fourteenth Amendment is the right to personal security when the state has undertaken to assure a person's safety. In Youngberg v. Romeo, 457 U.S. 307 (1982), a mentally retarded adult alleged that the state had responsibility for his physical safety and had failed to protect him from physical injury. The Court held that the plaintiff had a claim under §1983, holding that the "right to personal security constitutes a 'historic liberty interest' protected by the Due Process Clause." Id. at 315. The Court recognized the same right for school students, Ingraham v. Wright, 430 U.S. 651, 672-673 (1977), and prisoners. Hutto v. Finney, 437 U.S. 678 (1978).

Under the principles set forth in this case law, if the administrator of a mental hospital, by deliberate indifference, allowed a patient known to be violent to kill or maim other patients, the victims would surely have a due process claim. Practically speaking, there is no difference between that situation and a case in which a social worker, by deliberate indifference, allows a parent to kill or maim a child. In each case the victim is totally helpless, and the only possible source of aid is the state. In each case, the state has intentionally assumed the role of the protector of the victim. In each case, the indifference of the state to likely injury and death of a helpless victim is offensive to the fundamental values of our culture. While the Constitution

does not require that mental hospitals or protective services for abused children be provided, once they are provided, the Fourteenth Amendment sets minimal standards of civilized conduct for state action in both settings.

Abused children represent the absolute extreme case of a vulnerable group. Because the Fourteenth Amendment life and bodily integrity interests of abused children are completely dependent on the state, the federal courts should provide at least a minimal level of judicial scrutiny of the acts of the state after it recognizes their danger and becomes involved in their lives.

The Court Should Adopt An Appropriately Narrow Version of the Special Relationship Test

Several federal courts have allowed recovery in cases similar to

the case at bar on the basis of the "special relationship" doctrine. In Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985), the court found that a duty of constitutional dimension was created when a state protective services agency learned of "special danger" to the child. Id. at 510-511. A similar case is Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984). In that case, the court embraced the "special relationship" analysis, albeit in dictum.[7] The court wrote: "a right to affirmative protection need not be limited by a determination that there was a 'custodial relationship'." 747 F.2d at 194.

---

[7] The court affirmed a dismissal of the action on the grounds of qualified immunity. Id. at 194-196.

MCCY believes that the test for a "special relationship" should be limited to those who are in genuine need of special protection, such as children and other incompetents who are known to be at serious risk of physical harm. The focus should be on the following factors: (a) danger to the victim; (b) the helplessness of the victim; (c) knowledge by the state of the threat to the victim; and (d) the assumption of the role of protector by the state. This narrowed approach will provide protection to those who need it most and will avoid undue expansion of §1983 lawsuits.

MCCY urges the Court to reject a formalistic approach in which liability turns on whether or not the state has legal custody of the child-plaintiff. Whether or not the state obtains legal

custody of a child is often a matter of happenstance, with little relation to the risk to the child. The state may have legal custody of an abandoned child placed with his or her grandparents, in a situation where there is no cause for special scrutiny of the home. Or the state may, as in Joshua's case, have assumed life-and-death responsibility for, but not custody of, a child receiving dangerous and repeated injury from his own parents. The Court should adopt a pragmatic approach focusing on whether the state has assumed responsibility for a child whom it knows is vulnerable and at risk.

Abused Children Have No Effective Remedy, Other Than A Lawsuit

The remedy provided under Wisconsin tort law is inadequate to provide the relief necessary for Joshua

DeShaney. Under Wisconsin law, the amount recoverable for claims against governmental bodies, officers and employees in any action founded on tort may not exceed $50,000. Wis. Stat. §893.80(3), No punitive damages are allowed. Id. $50,000 is woefully inadequate to provide relief for a child who has suffered permanent brain damage and who is confined for life to an institution for the retarded.

A §1983 remedy is necessary as well, because the state protective services systems in America are largely immune from oversight. Federal law requires that every child's case be confidential. 42 U.S.C. §5103(b)(2)(E). Wisconsin law provides the same. Wis. Stat. §48.981(7). Cases of gross failure are often buried in the agency's files. As every child

advocate knows, litigation has the power to throw light on social institutions affecting children that fail to fulfill their mission.

An inquiry of the Department's actions and policies, through the vehicle of this litigation, may be the only chance that abused children in Wisconsin may have for redress of systemic flaws of the child protection system. If that avenue of reform is closed, children will suffer needlessly.

The Cause of Action Will Not Unduly Interfere With Social Work Case Practice

The Circuit Court argued that social workers will be placed on a "razor's edge, where if it terminates parental rights it is exposed to a section 1983 suit ... by the parent and if it fails to terminate those rights it is exposed to a section 1983 suit by

the child." 812 F.2d at 304. The assertion of this alleged dichotomy is wrong.

Under well-established principles, a worker, or the state, will only have §1983 liability when there has been "deliberate indifference" to the fate of the child. See Estelle v. Gamble, 429 U.S. 97, 106 (1976) (the Supreme Court applied the "deliberate indifference" standard in connection with a violation of the Eighth Amendment). See also Davidson v. Cannon, 474 U.S. 344, 347 (1986) (the Court held that a showing of mere negligence was insufficient to invoke compensation under §1983). Good faith error or simple negligence will not, and should not, lead to liability. Only very clear cases of violation of the basic rules of social work practice

in cases of manifest danger to children will survive a motion for summary judgment.

Rather than a "razor's edge", there is in fact a broad range of good faith protection for social workers and protective services agencies. Only in extreme cases, as, for example, when the agent of the state recklessly removes a child from its parents, or when by deliberate indifference it allows a child to be seriously harmed or killed, will there be liability. This is plainly the appropriate standard.

MCCY does not believe that this standard will distort social work practice or lead to automatic removal of children from their home in every case of reported abuse. Good social workers will continue to do good social

work. Rather, the §1983 action will serve as a deterrent to deliberate indifference to the danger to abused children, and will thereby provide protection for the nation's children.

The Federal Courts Are The Appropriate Forum For This Case

All of the criteria and standards of social work practice discussed above are suitable for expert testimony -- testimony which would be quite simple, clear and direct. The suggestion of the Circuit Court that state courts are somehow specially competent to deal with these cases such as these is unfounded. 812 F.2d at 304. If anything, the reverse is true. Federal courts have played a significant role in children's rights litigation. E.g., Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983); Doe v. New York City Dept. of Social Services, 709 F.2d 782 (2d

Cir. 1983); Doe v. Klein, 599 F.2d 338 (9th Cir. 1979); Youakim v. Miller, 562 F.2d 483 (7th Cir. 1977). Moreover, as is discussed above, child protection is regulated by federal law. And there is obviously no need for the trial court to have its own "staff of social workers" (as the Circuit Court suggests at 812 F.2d at 304) to try a case such as this one. Moreover because cases like this one involve the protection of federal rights, a federal forum is obviously appropriate.

CONCLUSION

For the foregoing reasons, the decision below should be reversed, and the case should be allowed to proceed to trial.

The grant of summary judgment, affirmed by the Circuit Court, should be reversed, and the case should be allowed to proceed to a trial on the merits.

Respectfully submitted,

Laura L. Carroll
Counsel of Record
Gene K. Landy
Sally A. VanderWeele
Kim E. Perry
WIDETT, SLATER &
GOLDMAN, P.C.
60 State Street
Boston, Mass. 02109
(617) 227-7200

June 13, 1988

71041 D-16 em

(6)

Supreme Court, U.S.
FILED
JUL 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-154

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

Joshua DeShaney, A Minor by his Guardian ad Litem, and Melody DeShaney,
Petitioners,

v.

Winnebago County Department of Social Services, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703)838-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

TABLE OF CONTENTS

	PAGE
ISSUES PRESENTED FOR REVIEW.....	2
INTEREST OF AMICUS CURIAE.....	2
STATEMENT OF THE CASE.....	4
ARGUMENT.....	4
I. INTRODUCTION.....	4
II. NO SUBSTANTIVE DUE PROCESS RIGHT IS IMPLICATED BY THE FACTS OF THIS CASE.....	9
III. THE DUE PROCESS CLAUSE PROTECTION OF "LIBERTY INTERESTS" EXTENDS ONY TO PROCEDURAL CONCERNS.....34	
CONCLUSION.....45	

TABLE OF AUTHORITIES

CASES: PAGE

Board of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982)..... 12

Board of Pardons v. Allen, 107 S.Ct. 2415, (1987)..... 36

Board of Regents v. Roth, 408 U.S. 564 (1972)..... 35

Daniels v. Williams, 106 S. Ct. 662 (1986).....37, 39

Daniels v. Williams, 106 S. Ct. 677 (1986) (Stevens, J., concurring)..... 6

Davidson v. Cannon, 106 S. Ct. 668 (1986)..... 38

DeShaney v. Winnebago County Dep't of Social Services, 812 F.2d 298 (7th Cir. 1987)..... 39

Doe v. New York City Dep't of Social Services, 649 F.2d 134 (2d Cir. 1981).....21, 22

Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985).....24, 25

Estelle v. Gamble, 429 U.S. 97 (1976).....21, 32

Griswold v. Connecticut, 381 U.S. 479 (1965).....9, 11

Hewitt v. Helms, 459 U.S. 460 (1988)..... 36

Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962)..... 43

Ingraham v. Wright, 430 U.S. 651 (1977).....passim

Jefferson v. Hackney, 406 U.S. 535 (1972)..... 19

Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984).....22, 23

Lindsey v. Normet, 405 U.S. 56 (1972)..... 19

Martinez v. California, 444 U.S. 277 (1980).....15, 16, 23, 24

Meyer v. Nebraska, 262 U.S. 390 (1923)..... 11

Moore v. City of East Cleveland, 431 U.S. 494 (1977)..... 13

Olim v. Wakenekona, 461 U.S. 238 (1983)..... 36

Palko v. Connecticut, 302 U.S. 319 (1937)..... 7, 10

Paul v. Davis, 424 U.S. 707 (1976)...34-35

Pierce v. Society of Sisters, 268 U.S. 510 (1925)..... 11

Poe v. Ullman, 367 U.S. 497 (1961)..... 13

Regents of University of Michigan v. Ewing, 106 S. Ct. 507 (1985).... 12, 13

Romeo v. Youngberg, 544 F.2d 147, (3d Cir. 1980)..... 29

San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973).18, 26, 27

Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987).....27, 28

Wood v. Strickland, 420 U.S. 315 (1975).....11, 12

Youngberg v. Romeo, 457 U.S. 307 (1982).....passim

STATUTES:

Alaska Stat. § 9.05.250 (1985)..... 44

Del. Code Ann. tit. 10, § 4001(3) (1987).....44, 45

D.C. Code Ann. § 6-1012 (1981)..... 45

Haw. Rev. Stat. §§ 662-2, 662-15 (1978)..... 44

Idaho Code § 6-904(1)-(8) (1981 & Supp. 1987)..... 44

Mass. Gen. Laws Ann. ch. 258, § 10 (Supp. 1988)..... 44

N.D. Cent. Code § 32-12.1-03(3) (1981)..... 44

Wis. Stat. Ann. § 893.80 (1983)..... 43

OTHER AUTHORITIES:

Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability, 56 U. Pa. L. Rev. 217, reprinted in Cohen and Cohen, Readings in Jurisprudence and Legal Philosophy 235 (1951)..... 5-6

No. 87-154

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

Joshua DeShaney, A Minor by his Guardian ad Litem, and Melody DeShaney,
Petitioners,

v.

Winnebago County Department of Social Services, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

Counsel for both parties have consented to filing of within brief.

ISSUES PRESENTED FOR REVIEW

Whether the due process clause guarantees a right to be free from reckless, willful and wanton, or grossly negligent misconduct of public officials in failing to protect a child from dangerous parents.

INTEREST OF AMICUS CURIAE

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's forty-nine state school boards associations, the Hawaii State Board of Education, the District of Columbia school board and the U.S. Virgin Islands. Established in 1940, NSBA is the only major national educational organization representing 15,300 school boards and their 97,000 members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school

children.

The individuals who compose this nation's school boards are elected (97%) or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity, and educational standards of the public schools.

The principle sought by the Petitioners in this case, if established by the Court, could significantly expand liability of local school boards for alleged negligence of school personnel in failing to protect students in their charge from the intentional acts of others. Petitioners seek to establish a federal tort standard which could impose liability on public entities for "negligence" even where general theories of causation under common law principles

of negligence law would not impose liability. Given the perceived "deep pockets" of school districts, plaintiffs would seek damages in federal courts, under 42 U.S.C. section 1983, for injuries to students inflicted by "judgment proof" third parties.

STATEMENT OF THE CASE

Amicus incorporates by reference thereto the statement of the case contained in brief of Respondents.

ARGUMENT

I. INTRODUCTION

The Bill of Rights of the U.S. Constitution was adopted to protect the people from abuse of governmental power. The Constitution protects both explicit and implicit rights from governmental abuse. But it does not protect against all damage caused by the government or which could have been prevented by the

government.

However one frames the issue in this lawsuit, its substance is nothing more than an attempt to make a "federal case" out of, at most, an act of negligence by a public employee. Given the lack of causation, what Petitioners seek is a form of "strict liability" which would not be available under any common law negligence theory.

> There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant...
>
> In the case of active misfeasance the victim is positively worse off as a result of the wrongful act. In cases of passive inaction plaintiff is in reality no worse off at all. His situation is unchanged, he is merely deprived of a

> protection which, had it been afforded him, would have benefited him.

Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability, 56 U. Pa. L. Rev. 217, reprinted in Cohen and Cohen, Readings in Jurisprudence and Legal Philosophy 235 (1951).

There is no legal theory under which Petitioners should be allowed to recover in a federal court. The Constitution's Bill of Rights was not designed to redress all wrongs, even if intentionally committed by the state and "it is not enough to note that [Petitioners] rely on the due process clause of the fourteenth amendment, for that clause is the source of three different kinds of constitutional protection." Daniels v. Williams, 106 S.Ct. 677, 677 (1986) (Stevens, J., concurring).

The first kind of constitutional

protection embodied in the due process clause incorporates the explicit provisions of the Bill of Rights; the second - substantive due process - bars arbitrary government actions directed toward "fundamental rights" which are "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), and are peripheral to the express protections in the Bill of Rights, and the third - "procedural due process" - guarantees procedural safeguards for deprivations of "life, liberty or property."

The facts in this case, however unfortunate in the result, do not present a due process violation. If the principle sought in this case were to be established by this Court, federal courts would be opened for lawsuits claiming constitutional violations for "gross

negligence" in failing to protect students from accidents on the playground, school bus accidents, injuries caused by defective athletic equipment and a myriad of other negligence actions which are more appropriately handled in state court under general principles of tort law.

Under the theories profferred by the Petitioners in this case, school boards could be held liable for "educational malpractice" if a student fails to get into college because of low academic skills; for a student's suicide or drug overdose; or for parental child abuse, where indicators of problems are alleged to have been readily observable by school personnel. If such matters are appropriate for judicial review at all, such review is only appropriate in state court under state law where the state determines what, if any, duty is owed to

the plaintiff.

II. NO SUBSTANTIVE DUE PROCESS RIGHT IS IMPLICATED BY THE FACTS OF THIS CASE.

Since plaintiffs do not allege a violation of an explicit right enumerated in the Bill of Rights, their claim must rest on either an implicit substantive right protected by the due process clause or on the right to procedural protections because the state has allegedly "deprived" plaintiffs of a liberty interest.

Traditionally, this Court has been temperate in overturning state policies on the ground that they violate "substantive due process." The Court has refused to find unconstitutional state action in absence of the existence of a explicit constitutional right or a right which is peripheral to the explicit right, called a "penumbral" right. Griswold v. Connecticut, 381 U.S. 479 (1965).

Penumbral rights, such as the freedom of association and the right of privacy, are deemed by the Court to be "fundamental or 'implicit' in the concept of ordered liberty." Palko, 302 U.S. at 325.

In each case where the Court has found a substantive due process violation, the Court has also found an overriding federal interest in protecting a "right" which the state has, through statute, ordinance or policy, trammeled. But in each case, the state has made a conscious choice, incorporated in a statute or a local policy, which in some way restricts that "right." The statutory policy has been intentionally adopted and enforced.

Under the rubric of "substantive due process," the Court has overturned statutes because they interfere with "penumbral" rights protected by the first amendment including the right of privacy

(use of contraceptives), Griswold v. Connecticut, supra; the right to educate one's children in the school of one's choosing, Pierce v. Society of Sisters, 268 U.S. 510 (1925); the right to study a foreign language, Meyer v. Nebraska, 262 U.S. 390 (1923). In all of these cases, the Court had before it a state statute which on its face abridged the free exercise of a "fundamental right." In those cases the Court discusssed "fundamental right" in terms of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer, 262 U.S. at 399.

Where actions to implement a local policy are challenged, this Court has hesitated to find substantive due process implications. In Wood v. Strickland, 420 U.S. 315 (1975), the Eighth Circuit Court

of Appeals found a substantive due process violation in a school board's alleged misinterpretation of its rule against the possession of alcoholic beverages on school grounds. This Court vacated the judgment, holding "[i]t is not the role of the federal courts to set aside decisions of school administrators which the cou may view as lacking a basis in wisdom or compassion." Id. at 326.

In 1982, in a per curiam opinion, this Court reversed another attempt by the Eighth Circuit, through the use of substantive due process, to substitute its own policy judgment for that of the school board. Board of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982).

In a concurring opinion in Regents of University of Michigan v. Ewing, 106 S.Ct. 507 (1985), Justice Powell stated that it was unnecessary for the Court to assume

the existence of a substantive due process right to be free from arbitrary dismissal from a medical program.

> While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution... substantive due process rights are created only by the Constitution. The history of substantive due process "counsels caution and restraint." Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977)..."Each new claim to [substantive due process] protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." [Citing Poe v. Ullman, 367 U.S. 497 (1961)."

Id. at 515 - 516

Under what substantive right do the Petitioners seek to be protected here? A right to be free from bodily harm? A right to be protected from dangerous parents? A right to be free from

governmental negligence? Substantive rights are not created out of whole cloth. They must either be expressly stated in the language of the Constitution itself or derive from express language.

There may be a substantive right to be free from bodily harm which is penumbral to express constitutional rights, but none of those rights are implicated here. For example, the eighth amendment protects those in the criminal system from "cruel and unusual punishment" which would include freedom from bodily harm. That amendment does not apply to social welfare agencies. Other prisoners rights would include a freedom from bodily harm component, e.g. the fifth amendment right relating to self incrimination and the sixth amendment right to counsel, but those rights do not apply here.

Even if the child had been abused by

a public employee, it is not clear that such action would constitute a violation of a "fundamental right" to be free from bodily harm. If the action was taken as part of enforcement of disciplinary rules or for some other official reason, it would raise a "liberty" interest protected by procedural due process, but not a substantive due process right. See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977) (relating to excessive corporal punishment).

Assuming that there is a substantive right to be free from bodily harm, that right is not implicated unless the state, qua state, inflicted the harm. In Martinez v. California, 444 U.S. 277 (1980), for example, plaintiffs alleged that the parole board erred in granting parole to one who later killed the plaintiffs' decedent.

This Court held that the death was too remote a consequence of the parole officer's action to constitute "state action."

> Appellants contend that the decedent's right to life is protected by the Fourteenth Amendment to the Constitution. But the Fourteenth Amendment protected her only from deprivation by the "State...of life...without due process of law." Although the decision to release [the parolee] from prison was action by the State, the action of [the parolee] five months later cannot be fairly characterized as state action. Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to his victim or to have proximately caused her death [citations omitted.], we hold that, taking these particular allegations as true, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment.

Id at 284-85.

If the action in Martinez is not

sufficient to give rise to a federal claim, surely the inaction in the instant case is insufficient to raise a claim. But assuming, arguendo, that such right exists, in order to be actionable the right must be intentionally abridged.

It is difficult to conceive of any other substantive right that could have been abridged by the Respondents in this case. Whatever rights the Petitioners may have under state law, substantive due process rights are created only by the Constitution, either expressly or implicitly because the right is "fundmental" to an orderly society. No such right is implicated here.

Petitioners and their amici are apparantly arguing that children have a substantive right to be protected by state and local child welfare agencies. This Court has been reluctant to denominate

public services as "fundamental rights" in absence of explicit constitutional language. For example, in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), while agreeing that education "is perhaps the most important function of state and local governments," this Court refused to hold that education is a "fundamental right" guaranteed by the U.S. Constitution.

> We are in complete agreement...that "the grave significance of education both to the individual and to our society" cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.

Id. at 30.

Petitioners and their amici make a compelling case for the need for effective child welfare agency oversight over young

children. But the importance of a service does not turn it into a fundamental right merely because the state opts to offer the service.

Similarly, the Court has declined to hold that there is a fundamental right to decent housing, Lindsey v. Normet, 405 U.S. 56 (1972) or welfare benefits, Jefferson v. Hackney, 406 U.S. 535 (1972).

Since substantive rights are created by the Constitution, not by state law, in order to hold here that Petitioners' substantive due process rights were violated, the Court must find there is a "fundamental right" to state protection from dangerous parents. Furthermore, if that right is a federally protected substantive right, it would exist whether or not the state or locality had a statutory mechanism for removing children from their parents. Thus, there would be

a constitutional duty to create and adequately staff a social welfare agency in every community to protect children from their parents. The argument that once a state offers a service, it must not negligently fail to provide the service, is an appropriate argument only with regard to procedural due process. As noted above, "fundamental rights" are created by the Constitution, not the states.

In absence of such a constitutional fundamental right, there can be no violation under the rubric of substantive due process for either negligent or deliberate action in failing to protect a child from his dangerous parents.

Petitioners cite four court of appeals cases in support of their position that the fourteenth amendment creates the child's right to an

affirmative duty of protection. As we shall see, in each of these cases, the courts make simplistic analyses of Supreme Court doctrine, arriving at unsupported conclusions.

The first decision, Doe v. New York City Deptartment of Social Services, 649 F.2d 134 (2d Cir. 1981), held that state officials may be held liable for their "deliberate indifference" in failing to protect a child from her foster parents. The Second Circuit rested its position on this Court's decision in Estelle v. Gamble, 429 U.S. 97 (1976). Estelle involved a prisoner who allegedly was not provided adequate medical attention while in prison. The Court held that the eighth amendment's proscription against cruel and unusual punishment includes the right to medical care for those whom the state is punishing by incarceration. While the

Second Circuit opinion does not purport to support application of the eighth amendment to social service agencies, nor does it point to any other "fundamental right" that was abridged by the state's "deliberate indifference." In absence of such a "right" no constitutional tort exists.

The Doe court erred when it created a constitutional duty from a finding of "deliberate indifference." No duty to refrain from "deliberate indifference" exists without a corresponding right to protection. No such right exists.

In the second case, Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), the court held that a child has a constitutional right to protection from harm inflicted by his parents, where a "special relationship" exists between the state and the child. The case was dismissed because

the defendants were entitled to good faith immunity because the law was not clearly established at the time of the injury. But the Jensen court discusses this Court's holding in Martinez v. California, supra, stating that the Court left open the possibility that a fourteenth amendment right to protection exists under 42 U.S.C. section 1983.

Martinez held that the parole officer, under the circumstances of the case, did not "deprive" the decedent of life. The Court left open the possibility that under other circumstances the parole officer "could...be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole." Id. at 285. However, in a footnote the opinion cautions that "[i]t must be remembered that even if a state decision does deprive an individual of

life or property, and even if that decision is erroneous, it does not necessarily follow that the decision violated that individual's right to due process." Id. at 284 n.9. It should also be noted that Martinez was not a substantive due process case. It involved the issue of whether the statutory grant of immunity to parole officers resulted in a deprivation of life without procedural due process.

In the third lower court case on which the Petitioners rely, Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985), the majority opinion also cites the Martinez dictum in support of its judgment for the plaintiffs. The decision, in a footnote, cites Ingraham v. Wright, supra, for the proposition that "[t]here is a liberty interest in being free from physical assault that can be

fairly attributed to the action of a state." Id. at 509 n.7. Ingraham, of course, involved intentional conduct (imposition of corporal punishment to a student) by public employees and the Court acknowledged a "liberty interest" for purposes of procedural due process. The Court expressly refused to decide the question of whether excessive corporal punishment implicates substantive due process.

The dissent in Estate of Bailey by Oare correctly notes that:

> [S]ection 1983 does not create a federal cause of action for every wrong committed by government employees, no matter how unpleasant the consequences, and notwithstanding that the facts might give rise to a state tort law claim.

Id. at 512.

> There is a danger that by extending [Section 1983] to contexts far removed from Congress' original and

> overarching purposes, a national state tort claims act administered in the federal courts in effect will be created. Steps in that direction should not be lightly taken since the ultimate outcome of such a course might well be incongruent with our role as federal judges.

Id. at 513.

Petitioners seek to impress upon this Court the great public importance of welfare agencies performing their function to protect children from dangerous parents. No caring person could possibly dispute that argument. But the Constitution does not protect against all wrongs. As this Court stated with regard to education, in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33 (1973):

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether

> education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

In Rodriguez the Court also noted that education decisions present "a myriad of 'intractable economic, social, and even philosophical problems'" that are best left within the expertise of state and local officials, not the courts. Id. at 42. That caveat would seem to apply equally to decisions of other governmental agencies, such as the one in this case.

Finally, Petitioners cite Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), as supporting the notion that there is a federal right which is violated by "gross

neglect" or "deliberate indifference" of child protection agencies. Taylor was a case involving a child who was placed by the state in the custody of foster parents who abused the child. The circuit court in Taylor cited Youngberg v. Romeo, 457 U.S. 307 (1982) in support of its position that fundamental rights were implicated by the state's action in placing the child in unsafe hands. Petitioners reliance on Taylor is misplaced. This Court ruled in Youngberg that the eighth amendment protection against "deliberate indifference" does not apply in a civil setting.

There is a tremendous analytical leap between Youngberg and the instant case. The plaintiff in Youngberg, a mentally retarded adult, was involuntarily committed to a state institution. Citing Ingraham v. Wright (a procedural due

process case), this Court noted that the "right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." Youngberg, 457 U.S. at 315. The Court agreed with the court of appeals that the trial court erred in instructing the jury that the eighth amendment applies but vacated the appeals court on the standard to be applied. The Court instead adopted the standard of Chief Judge Seitz, the author of a concurring opinion in Youngberg. Judge Seitz opined that the standard for determining malpractice does not apply but, instead, the jury "should decide only whether the defendants' conduct had some basis in accepted professional opinion." Romeo v. Youngberg, 544 F.2d 147, 178 (3d Cir. 1980).

Since the Supreme Court holds that

the substantive right must be balanced against the state's "considerable discretion in determining the nature and scope of its responsibilities," Youngberg, 457 U.S. at 317, it is unclear why a state negligence lawsuit would not be sufficient to protect the constitutional interests of the incarcerated individual. Arguably, Youngberg announced a civil version of the eighth amendment, creating a substantive liberty interest in freedom from cruel and unusual punishment when subjected to involuntary civil commitment. Although the Court refused to find the eighth amendment applicable to civil commitments, clearly the Court was eager to find a way of equating the constitutional duties of the state vis a vis incarcerated criminals, with those of the state vis a vis civil commitees. "If it is cruel and unusual punishment to hold convicted

criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed-who may not be punished at all-in unsafe conditions." Youngberg, 457 U.S. at 315.

It should also be noted that the State in its brief in Youngberg conceded a duty to provide adequate food, shelter, clothing, and medical care, id. at 324, requiring the Supreme Court to take that concession only one step further to include "reasonable safety."

Amicus American Civil Liberties Union is incorrect in its statement that the "Court has never held that formal state custody is a necessary predicate to establish the constitutional right to personal security under the Fourteenth Amendment." Amicus Curiae brief of A.C.L.U. at page 11. Ingraham v. Wright, supra, cited by A.C.L.U. in support of

that statement, did not decide the question of whether gross negligence raises substantive due process claims. The other cases dealing with the question of bodily security are criminal cases or cases involved civil commitment.

Amicus, A.C.L.U. is also incorrect in their assessment that the rulings in Youngberg and Estelle, supra, were based on a premise that "the injured plaintiff [in each case] had relied completely on the state for his or her protection." Amicus curiae brief of A.C.L.U. at page 28. In each case the plaintiffs were incarcerated. "When a person is institutionalized-and wholly dependent on the State-it is conceded by [the State] that a duty to provide certain services and care does exist (emphasis supplied)...." Youngberg, 457 U.S. at 317.

The state's action in taking an individual's freedom and thus depriving him of the protection of his parents is very different from state inaction in failing to provide a service, in absence of incarceration. In the instant case there has been no commitment and federal courts should look to state tort remedies to determine if procedural protections are adequate, rather than creating a new substantive constitutional right.

"A state is under no constitutional duty to provide substantive services for those within its border." Youngberg, 457 U.S. at 319. Amicus submits that there is no constitutional right to protection outside the context of involuntary civil or criminal incarceration. Whether the public officials were guilty of simple or gross negligence or whether the negligence was active or passive, Petitioners were

not deprived of a substantive constitutional right.

III. THE DUE PROCESS CLAUSE PROTECTION OF "LIBERTY INTERESTS" EXTENDS ONLY TO PROCEDURAL CONCERNS.

Although Petitioners cannot show a substantive due process right which could arguably be said to be abridged in this case, it should be determined whether there is a liberty interest meriting protection for purposes of procedural due process. And, if so, whether the state "deprives" a person of the interest, under 42 U.S.C. Section 1983, by action which is not intentional.

A number of "liberty" interests which are protected by the procedural guarantees of the fourteenth amendment, even though they may not be recognized as "fundamental rights." "These interests attain this constitutional status by virtue of the fact that they have been initially

recognized and protected by state law...." Paul v. Davis, 424 U.S. 707, 711 (1976).

By establishing a social services agency with a mission of protecting children, the state does not necessarily confer a constitutional right to the service. If that were true, every public agency, including school districts, police and fire departments and hospitals would be subject to a duty to provide services to all; a loss which could fairly be attributed to the state's failure to provide the service, would be actionable under the due process clause.

The state must do more than merely offer a service before a service recipient can claim a right to the service. In Board of Regents v. Roth, 408 U.S. 564 (1972), this Court held that a state statute could give rise to a property or liberty interest that merited procedural

due processs protection, but in order for such an entitlement to be present, the Court said it was not enough for one to have an abstract need or desire for a benefit, but instead one must have a "legitimate claim of entitlement" to the benefit. In subsequent cases, this Court has framed the entitlement issue in terms of whether the statute places any "real limits on decisionmaker discretion." Board of Pardons v. Allen, 107 S.Ct. 2415, 2423 (1987) (O'Connor, J. dissenting) See also Olim v. Wakenekona, 461 U.S. 238 (1983); Hewitt v. Helms, 459 U.S. 460 (1988). While it is true that the Wisconsin child protection law mandates that the county social services agency take certain steps when it receives notification of suspected child abuse, it also leaves many of the ultimate determinations to the agency's discretion

without the constraint of "particularized standards or criteria."

Even assuming there is a statutory entitlement giving rise to a constitutionally protected liberty or property interest, the state cannot negligently deprive one of that interest, regardless of whether the negligence is simple or "willfull and wanton."

This Court has held that the state does not deprive a person of "life, liberty or property" by negligently causing the loss. In Daniels v. Williams, 106 S.Ct. 662 (1986), the Court held that the "Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property." Id. at 663. In that case a prisoner was injured in a fall over a pillow left on the stairs.

In a companion case to Daniels, Davidson v. Cannon, 106 S.Ct. 668 (1986), the Court refused to hold that prison officials abridged a prisoner's constitutional rights, by negligently failing to protect him from an assault by a fellow prisoner. The Court ruled that no procedural due process claim was presented even though the state granted immunity to prison officials for negligent acts. The Court cited the opinion of two of the judges who voted with the majority in the lower court decision which ruled against the prisoner. "[E]ven if respondents' negligence had 'deprived' petitioner of liberty, the State's decision not to provide a remedy, in view of its strong interest in protecting its prison officials from liability, did not violate due process." Id. at 670.

In the instant case, the court below

"assume[s] without having to decide" that the conduct of Respondents was "sufficiently aggravated form of negligence to escape the bar of Daniels v. Williams." DeShaney v. Winnebago County Dep't of Social Services, 812 F.2d 298, 302 (7th Cir. 1987). This assumption stems from a footnote in Daniels that the opinion does not reach the question of whether due process is implicated by conduct which is more egregious than simple negligence.

Although it might be appropriate to apply a different rule to aggravated negligence involving prisoners, there does not seem to be a reason to alter the Daniels rule in a case such as that at bar. This Court has recognized that aggravated negligence constituting "deliberate indifference" to the medical needs of those incarcerated by the state,

constitutes an eighth amendment violation. Similarly, it would seem, aggravated negligence or "deliberate indifference" to an assault by another prisoner could be sufficient to lead the Court to rule that eighth amendment rights are violated.

But the eighth amendment applies only in the criminal context. Ingraham v. Wright, supra. It does not apply in cases such as the instant case. Even in absence of the eighth amendment, there might be cause to rationalize extension of due process coverage for willful and wanton conduct because of the closed environment of the criminal justice system. It could even be argued that the requisite intent under the due process clause is satisified by the action in placing the prisoner in that closed environment, where he could be injured by others.

Such rationale would not be

appropriate, however, for expanding coverage of the due process clause to grossly negligent actions of public officials in contexts other than the criminal justice system. In the schools, for example, this Court has noted that, unlike state prisoners, injured parties in civil contexts have the power to resort to state remedies.

> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

Ingraham, 430 U.S. at 670.

Prisoners are not in the position to file criminal assault charges or to seek the assistance of others, because the complaints would have to be filed with the very officials who have committed the offense. In those cases there is no reasonable way to obtain due process from

the state, and therefore, the injured party must resort to the federal courts.

Although it is true that some forms of "negligence" may be so aggravated as to come close to intentional conduct, nevertheless the element of intent is still missirg. As expressed by Justice Holmes, "even a dog knows the difference between being kicked and being tripped over."

A state court would not find proximate cause in the facts of this case. But, even assuming there was a breach of some kind of moral duty, that would be insufficient. In order to justify recovery of damages, there must be a breach of a constitutional right. The fact that the state could arguably have prevented bodily injury to the Petitioner is not sufficient to raise a constitutional duty to act.

Moreover, even were this Court to decide that the state's failure to act constituted a "deprivation" of a liberty interest, procedural due process is satisfied by post-deprivation remedies afforded by state tort laws.

In Wisconsin, the doctrine of sovereign immunity protecting public officials or employees from suit was judicially abrogated in 1962. Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962). This opinion plainly noted that state legislators could reinstate the doctrine if they so decided, but Wisconsin lawmakers chose instead to enact a governmental tort claims statute which draws much of its content from the Holytz opinion, although it does not expressly waive immunity. Wis. Stat. Ann. § 893.80 (1983). Most other states have statutorily waived the immunity of local

government entities, such as school districts, from suit for the negligent acts of public employees. See Appendix. States that have enacted general tort immunity waivers often except certain acts such as execution of statutes, regulations, ordinances with due care or carrying out of discretionary functions. E.g., Alaska Stat. § 9.05.250 (1985); Haw. Rev. Stat. § 662-2, 662-15 (1978); Idaho Code §§ 6-904(1)-(8), 6-918 (1981 & Supp. 1987); Mass. Gen. Laws Ann. ch. 258, § 10 (Supp. 1988); N.D. Cent. Code § 32-12.1-03(3) (1981). Other states have limited waivers that subject school districts to suit for negligence in specific instances, for example, operation of motor vehicles or construction and maintencance of public buildinges. Some states that do not waive tort immunity, generally do allow suits against

governmental entities for gross negligence. E.g. Del. Code Ann. tit. 10, § 4001(3) (1987); D.C. Code Ann. § 6-1012 (1981).

In the event that a case arises where the state does not permit a cause of action for public officials' negligence, even though willfull and wanton, the Court can assess whether the reasons for not providing a remedy are rational for purposes of procedural due process.

CONCLUSION

The failure of the state officials in this case, however egregious it may seem in retrospect, is not unconstitutional. Understandably, Petitioners want to make a "federal case" out of their loss, but the Constitution does not provide a remedy for all losses, however serious they may be.

The seriousness of the injury does not determine whether the Constitution is

implicated. This determination turns on whether the state's action violated a substantive or procedural right protected by the Constitution.

There is no substantive due process violation here because no fundamental right is implicated, and no policy or statute is involved which could be termed "irrational," "arbitrary" or "capricious." As shown above, there is no explicit right in the Bill of Rights from which a fundamental right to protection can be extracted. And, there is no policy or statute which gave rise to the injury.

Similarly, there was no procedural due process violation for two reasons. First, because there is no "liberty interest" created either by state law or by the Constitution itself which would require adoption of procedures to protect from its deprivation. Second, even

assuming a "liberty interest" in freedom from injury caused by grossly negligent actions of the state, the state has provided procedural remedies for such injuries through its tort laws.

It requires no gift of prophecy to anticipate that, if the decision below is reversed, litigants will frame their complaints with sufficiently florid allegations to survive a motion to dismiss, thus, inviting into federal court disputes that should have remained in the state court system.

It simply cannot be said that by offering a service, the state opens itself up to a federal lawsuit when it fails to live up to the expectations of the citizenry as to how that service should be provided. Some might say that the state should provide a remedy to the petitioners in this case, even in absence of proof of

actual negligence. Others might favor some form of strict liability where the state fails to protect children from their parents. Still others might view the presumption in state law favoring parental custody over children as too strong.

But, these complex policy considerations should not and cannot be resolved in the federal courts any more than a myriad of other issues raised by the offering of governmental services, such as education, health, police and fire protection. Federal courts protect against deliberate abuse of power, not ineptitude.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

APPENDIX

STATUTORY WAIVER OF SCHOOL DISTRICT'S TORT IMMUNITY

STATE	IMMUNITY WAIVED FOR SIMPLE NEGLIGENCE	IMMUNITY WAIVER FOR GROSS NEGLIGENCE
AL		
AK	X	X
AZ		X(17,18)
AR	X(1)	X(1)
CA	X	X
CO	X(2,5,7)	X(2,5,7)
CT	X	X
DE		X
DC		X
FL	X	X
GA		
HI	X	X
ID	X	X
IL	X	X
IN		X(4)
IA	X	X
KA	X	X
KY	X(9,13)	X(9,13)
LA	X	X
ME	X(5,6,7)	X(5,6,7)
MD	X(2,13)	X
MA	X	X
MI	X(5,7)	X(5,7)
MB	X	X
MS	X(10/1/88)	X(10/1/88)
MO	X(5,6,7)	X(5,6,7)
MT	X	X
NE	X	X
NV	X	X
NH	X(5,7)	X(5,7)
NJ	X(7,9)	X(7,9)
NM	X(5,6,7)	X(5,6,7)
NY	X(5)	X(5)

STATE	IMMUNITY WAIVED FOR SIMPLE NEGLIGENCE	IMMUNITY WAIVER FOR GROSS NEGLIGENCE
NC	X(2)	X
ND	X	X
OH	X(5,8)	X(5,8)
OK	X	X
OR	X	X
PA	X(5,7,19)	X(5,7,19)
RI	X	X
SC	X	X
SD		
TN	X(5,7,9)	X(5,7,9,10)
TX	X(5,11)	X(4,5,11,12)
UT	X(5,7,9,15,16)	X(5,7,9,15,16)
VT	X(2)	X(2)
VA	X(13)	X(13)
WA	X	X
WV	X(5,7,9)	X(5,7,9)
WI	X	X
WY	X(5,7)	X(5,7)

FOOTNOTES

1 only for school bus drivers and operators

2 only to the extent of insurance

3 only in execution or enforcement of laws

4 only in administering medication to students

5 only for operation of motor vehicle

6 only for machinery, furnishings

7 only for construction, operation and/or maintenance of public buildings or other property, thoroughfares

8 only for proprietary functions

9 only for negligence of employees

10 only for gross negligence of board members

11 only when bodily injury caused to student

12 only for gross negligence when disciplining students

13 only as to state liability, not local governmental entities

14 only when rendering emergency first aid

15 only as to contractual obligations

16 only as to property actions

17 only as to issuance or failure to revoke any permit, license, certificate, approval etc.

18 only as to failure to discover violations of inspection laws applicable to property other than property owned by the public entity

19 only as to trees, traffic controls, street lighting, utility services, animals

STATUTORY CITATIONS

Alaska Stat. § 9.05.250 (1985)

Ariz. Rev. Stat. Ann. § 12-820.01 (Supp. 1987)

Ark. Stat. § 80-1811 (1975) (school district not liable, just driver or operator of a school bus)

Cal. Govt. Code § 945 (1978)

Colo. Rev. Stat. §§ 24-10-104, -106 (1984)

Conn. Gen. Stat. §§ 10-212a, 52-557b(b) (1985)

Del. Code Ann. tit. 10, § 4001(3) (1987)

D.C. Code Ann. § 6-1012 (1981)

Fla. Stat. Ann. § 768.28(1), (5) (1977)

Haw. Rev. Stat. § 662-2 (1978)

Idaho Code § 6-903(a) (1981 & Supp. 1987)

Ill. Rev. Stat. Ch. 122 §§ 821-31 (1962 & Supp. 1988) (sovereign immunity of school districts waived by Molitor v. Kaneland Community Dist. No. 302, 18

Ill.2d 11, 163 N.E.2d 89 (1959), cert. denied, 362 U.S. 968 (1960)

Ind. Code Ann. § 34-4-16.5-3.5 (1986 & Supp. 1987)

Iowa Code §§ 613A.2, 613A.4 (1985)

Kan. Stat. Ann. § 75-6101 (1983 & Supp. 1987)

Ky. Rev. Stat. Ann. § 44.072(Supp. 1986)

La. Const. art. 12, § 10(A) (1977)

Me. Rev. Stat. Ann. tit. 14, § 8104 (1984)

Md. State Govt. Code Ann. §§ 12-103, -104 (1984 & Supp. 1987)

Mass. Gen. Laws Ann. ch. 258 § 2 (Supp. 1988)

Mich. Comp. Laws §§ 691.1405, .1406 (1982 & Supp. 1987)

Minn. Stat. Ann. § 466.02 (1984)

Miss. Code Ann. § 11-46-5(1) (Supp. 1987)

Mo. Rev. Stat. § 537.600 (1987)

Mont. Code Ann. § 2-9-102 (1983)

Neb. Rev. Stat. § 23-2407(1985)

Nev. Rev. Stat. § 41.031 (1987)

N.H. Rev. Stat. Ann. § 507-B:2 (1983)

N.J. Stat. Ann. §§ 59:2-2, 59:3-1, 59-4-2 (1983)

N.M. Stat. Ann. § 41-4-4 to -4-6 (1978)

N.Y. Gen. Mun. Code § 50-6 (1986)

N.C. Gen. Stat. § 115C-42 (1987)

N.D. Cent. Code § 32-12.1-03(1) (1981)

Ohio Rev. Code Ann. § 2744.02(A), (B)(1), (2) (1988)

Okla. Stat. Ann. tit. 51, §§ 153, 155 (1984)

Or. Rev. Stat. § 30.265 (1987)

Pa. Stat. Ann. tit. 42, § 8542 (1982)

R.I. Gen. Laws § 9-31-1 (Supp. 1983)

S.C. Code Ann. §§ 15-78-20 to -60 (Supp. 1987)

Tenn. Code Ann. §§ 29-20-201 to - 205 (1980)

Tex. Educ. Code Ann. §§ 21.912(b) .914 (1987); Tex. Civ. Prac. & Rem. Code §

101.021, .051 (1986)

Utah Code Ann. §§ 63-30-5 to - 10 (1986)

Vt. Stat. Ann. tit. 29, § 1403 (1986)

Va. Code Ann. § 8.01-195.3 (1984 & Supp. 1988)

Wash. Rev. Code Ann. § 4.96.010 (Supp. 1988)

W. Va. Code § 29-12A-4 (1986)

Wis. Stat. Ann. § 893.80 (1983) (Legislative Council Report notes judicial waiver of immunity from which statute draws some of its content)

Wyo. Stat. §§ 1-39-105, -106 (1987)

No. 87-154

Supreme Court, U.S.
FILED
AUG 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

JOSHUA DeSHANEY, a Minor, by his Guardian ad Litem, and MELODY DeSHANEY,

Petitioners,

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES; WINNEBAGO COUNTY; ANN KEMMETER and CHERYL STELSE,

Respondents.

Brief of the States of New York, Connecticut, Maryland, Oregon, Pennsylvania and Wisconsin as *Amici Curiae* in Support of Respondents

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for The State of New York as Amicus Curiae
The Capitol
Albany, NY 12224
(518) 474-6697

O. PETER SHERWOOD
Solicitor General
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

MICHAEL S. BUSKUS
Assistant Attorney General

of Counsel

Dated: August 9, 1988

(Additional List of Counsel on Inside Cover)

JOSEPH I. LIEBERMAN
Attorney General of Connecticut
30 Trinity Street
Hartford, CT 06106

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
7 North Calvert Street
Baltimore, MD 21202

DAVE FROHNMAYER
Attorney General of Oregon
200 Justice Building
Salem, OR 97310

LEROY S. ZIMMERMAN
Attorney General of Pennsylvania
Strawberry Square
Harrisburg, PA 17120

DONALD J. HANAWAY
Attorney General of Wisconsin
CHARLES HOORNSTRA
Assistant Attorney General
P. O. Box 7857
Madison, WI 53707

Table of Contents.

Page

Interest of *Amici Curiae* 1

Summary of Argument..... 4

ARGUMENT:

POINT I This case may be decided, and the judgment below affirmed, on the narrow ground that social services caseworkers (and their supervisors) perform classic quasi-judicial tasks, and hence, are protected by absolute immunity from money damages liability..... 6

POINT II Due process is not implicated by alleged shortcomings in supervisory and monitoring services of child protective caseworkers, at least where no custodial "control" over children is involved 11

A. The custodial cases are not controlling 11

B. Special factors in the family law area 12

C. Prior precedents do not support liability and, in fact, demonstrate that no liability should exist here..... 15

Conclusion 21

TABLE OF AUTHORITIES.

CASES:

	Page
Archie v City of Racine, 847 F2d 1211 (7th Cir 1988) (en banc)	20
Baez v Hennessy, ____ F2d ____, No. 87-7834 (2d Cir July 27, 1988)	7
Bailey, Estate of, by Oare v County of York, 768 F2d 503 (3d Cir 1985)	17
Baker v McCollan, 443 US 137 (1979)	18, 19
Briscoe v LaHue, 460 US 325 (1983)	7
Butz v Economou, 438 US 478 (1978)	8, 9, 10
City of St. Louis v Praprotnik, ____ US ____, 108 S Ct 915 (1988)	7
C.L. v Olson, 143 Wis 2d 701, 422 NW2d 614 (1988)	8
Daniels v Williams, 474 US 327 (1986)	17, 18
Davidson v Cannon, 474 US 344 (1986)	18
Dewey v Des Moines, 173 US 193 (1899)	7
DeShaney v Winnebago County, 812 F2d 298 (7th Cir 1987)	16, 17
Doe v County of Suffolk, 494 F Supp 179 (EDNY 1980)	9
Enis, In re, 121 Ill 2d 124, 520 NE2d 362, 117 Ill Dec 201 (1988)	13

	Page
Estelle v Gamble, 429 US 97 (1976)	11, 12
Evans v Dillahunty, 711 F2d 828 (8th Cir 1983)	8
Harpole v Arkansas Dept. of Human Services, 820 F2d 923 (8th Cir 1987)	17
Hendricks v State of Oregon, 67 Or App 453, 678 P2d 759, *lv denied* 297 Or 228, 683 P2d 91 (1984)	8
Hennessey v State of Washington, Dept. of Social and Health Services, 627 F Supp 137 (ED Wa 1985)	9
Home Tel. & Tel. Co. v Los Angeles, 227 US 278 (1913)	15
Hudson v Palmer, 468 US 517 (1984)	12
Hunter v Bd of Ed, 292 Md 481, 439 A2d 582 (1981)	20
Illinois v Gates, 462 US 213 (1983)	7
Imbler v Pachtman, 424 US 409 (1976)	7, 9, 10
Johnson v Glick, 481 F2d 1028 (2d Cir), *cert. denied sub nom.* John v Johnson, 414 US 1033 (1973)	16
Jones v Phyfer, 761 F2d 642 (11th Cir 1985)	17
Marie B, Matter of, 62 NY2d 352, 477 NYS2d 87, 465 NE2d 807 (1984)	13
Martinez v California, 444 US 277 (1980)	19

Page

McClary v O'Hare, 786 F2d 83 (2d Cir 1986) 16

Midamerica Trust Co. v Moffatt, 158 Ill App 3d 372, 511 NE2d 964, 110 Ill Dec 787 (Ill App 1987) 9

Monroe v Pape, 365 US 167 (1961) 15

Nelson v Missouri Osteopathic Foundation, 626 F Supp 604 (WD Mo 1985)..... 8

Oklahoma City v Tuttle, 471 US 808 (1985)..... 7

Parham v J.R., 442 US 584 (1979)..... 13

Pate v Alabama Board of Pardons & Paroles, 409 F Supp 478 (MD Ala 1976), *affd no opn,* 548 F2d 354 (5th Cir 1977)..... 8

Paul v Davis, 424 US 693 (1976) 18

Payton v United States, 679 F2d 475 (5th Cir 1982) 18

Pembaur v Cincinnati, 475 US 469 (1986) 7

Peter W. v San Francisco Unified School Dist., 60 Cal App 3d 814, 131 Cal Rptr 854 (1976).... 14

Procunier v Navarette, 434 US 555 (1978) 7

Purdy v Public Administrator of County of Westchester, 72 NY2d 1, 1988 WL 53002 (1988) .. 18

Santosky v Kramer, 455 US 745 (1982)..... 13

Scott County Master Docket, In re, 672 F Supp 1152 (D Minn 1987)..... 9, 20

Page

Screws v United States, 325 US 91 (1945)..... 16

Sellars v Procunier, 641 F2d 1295 (9th Cir) *cert. denied,* 454 US 1102 (1981)..... 8

Sherrill v Wilson, 653 SW2d 661 (Mo 1983)..... 18

Smith v Eley, 675 F Supp 1301 (D Utah 1987) 20

Stanley v Illinois, 405 US 645 (1972)..... 13

Stump v Sparkman, 435 US 349 (1978)..... 7

Tarter v State of New York, 68 NY2d 511, 510 NYS2d 528, 503 NE2d 84 (1986) 8

Tennessee v Garner, 471 US 1 (1985) 15

Tobin v Grossman, 24 NY2d 609, 301 NYS2d 554, 249 NE2d 419 (1969)..... 20

Torres v Little Flower Children's Services, 64 NY2d 119, 485 NYS2d 15, 474 NE2d 223 (1984), *cert. denied,* 474 US 864 (1985) 14

Tubell v Dade County Public Schools, 419 So 2d 388 (Fla App 1982)..... 14

Walden v Wishengrad, 573 F Supp 1115 (WDNY 1983), *affd,* 745 F2d 149 (2d Cir 1984)..... 9, 10

Walker v Rowe, 791 F2d 507 (7th Cir), *cert. denied,* 107 S Ct 597 (1986)..... 16

Wells v Walker, 671 F Supp 624 (ED Ark 1987).... 17

Page

Whelehan v County of Monroe, 558 F Supp 1093 (WDNY 1983)..... 9, 10

Whitley v Albers, 475 US 312 (1986)..... 11

Wisconsin v Yoder, 406 US 205 (1972)..... 13

Youngberg v Romeo, 457 US 307 (1982)..... 11, 12, 18

UNITED STATES CONSTITUTION:

Fourth Amendment..... 16

Fourteenth Amendment..... 3

FEDERAL STATUTES:

42 USC § 1983..... 3, 4

42 USC § 1988..... 3, 6

MISCELLANEOUS:

Currie, *Positive and Negative Constitutional Rights*, 53 U Chi L Rev 864 (1986)..... 16

Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U Pa L Rev 75 (1968)..... 14

Prosser & Keeton, *Law of Torts* (5th ed 1984), § 132, p 1058..... 10

Restatement, Second, of Torts § 314..... 17

Page

Restatement, Second, of Torts § 319..... 17

Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed 1986), § 6.26..... 7

Supreme Court Rule 36.4..... 1

Tyrell, *Prediction of Dangerousness*, Vol. 34, No. 1, Medical Trial Quarterly 24 (1987)..... 14

No. 87-154

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSHUA DESHANEY, a Minor, by his Guardian ad Litem, and Melody DeShaney,

Petitioners,

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES; WINNEBAGO COUNTY; ANN KEMMETER AND CHERYL STELSE,

Respondents.

Brief of the States of New York, Connecticut, Maryland, Oregon, Pennsylvania and Wisconsin as *Amici Curiae* in Support of Respondents

Interest of *Amici Curiae*

Amicus State of New York and the other *amici* States respectfully submit this brief pursuant to Supreme Court Rule 36.4 in support of respondents. The *amici* urge this Court to affirm the judgment of the court below.

The *amicus* State of New York indirectly funds a significant portion of the child protective caseworker activity in

New York State. While many of these caseworkers are county employees, State revenue sharing assists in the provision of these services. Additionally, the State, through its Department of Social Services, provides training and continuing education for caseworkers. The State plays an indirect role in the quality of care furnished by the caseworkers by distribution of a Child Protective Services Program Manual. This Manual, which reprints relevant statutes, regulations and forms for court proceedings, also enumerates guidelines and procedures for child protective caseworkers. The Manual suggests methods of investigating and documenting suspected incidents of child abuse and maltreatment so that available evidence can be presented in usable form to prosecutors and courts. The State Department of Social Services also maintains a computerized, centralized register of child abuse allegations and provides this information to local caseworkers and courts. In sum, the State is significantly involved in overseeing the provision of child care protective services, even though local government employees generally are responsible for actual delivery of these services in the field.

While the details of the programs and statutes vary from state to state, the description of New York's child care protective services system is generally similar to those in the other *amici* states.

Thus, *amici* have a financial, a professional and an operational interest in this case which involves potential "constitutional tort" liability of child protective caseworkers and their supervisors. Therefore, this brief expresses the concerns of *amici's* child protective caseworkers, as well as the interests of state and local government agencies.

The *amici* submit that child protective officials, such as caseworkers and their supervisors, should not be exposed to money damages liability under 42 USC § 1983 (and, derivatively, to attorneys' fee awards under 42 USC § 1988), when, as here, the caseworkers do not themselves have physical custody of a child subsequently abused by a parent in lawful custody of the child. Regardless of how characterized, omissions of child protective caseworkers to take action to upset the strong presumption of parental custody of children should not be actionable under 42 USC § 1983 as a violation of the due process clause of the Fourteenth Amendment.

The *amici* recognize the unfortunate tragedy that was inflicted by an abusive parent upon the infant petitioner in this case. Yet, in this and similar cases, governmental providers of supportive social services are limited—by constitutional constraints, by statutory provisions, by court decisions on burdens of proof as to custody of children and termination of parental rights, by heavy caseloads, and by availability of staff and resources—from taking action in every case which, in hindsight, might have prevented injury if parental rights were challenged, contested or deprived. More importantly, child protective caseworkers, despite the best of motivation and training, are unable reliably to predict whether parents will abuse children.

Therefore, *amici* respectfully submit this brief to articulate the problems and concerns of the child protective caseworkers and supervisors whose ability to discharge their professional responsibilities is threatened by petitioners' lawsuit now before this Court.

Summary of Argument

While the court below properly affirmed the dismissal of the complaint, it did so on the basis that the due process clause does not furnish a "constitutional tort" remedy against *non-custodial* governmental actors, even for errors or omissions claimed to involve gross negligence, deliberate indifference, or willful and wanton misconduct. We agree with that result, but we first discuss another sound and simple reason why liability could not exist in *this* case. In our view, regardless of whether petitioner's allegations might otherwise state a cause of action, they are nonetheless an insufficient predicate for liability, as absolute immunity should insulate child protective caseworkers and their supervisors from liability.

In many respects, the job of a child protective caseworker resembles that of a prosecutor or parole officer. Each performs a quasi-judicial task of measuring facts and circumstances against a set of general criteria (*e.g.*, constitutional, statutory and regulatory). Each must decide whether evidence, often circumstantial, is sufficient to justify formal charges. Each must be mindful of the burdens of proof the courts interpose. Each must temper judgmental, discretionary decisions with the practical consequences that time and effort devoted to presenting or prosecuting unsustainable charges will divert resources from other cases and other responsibilities. Yet, because none of these officers are able reliably to predict future human behavior, none of them are or should be subject to federally imposed liability for the performance of their quasi-judicial tasks. All the more so should child protective caseworkers not be exposed to damages liability under 42 USC § 1983 because of the overwhelming constitutional, statutory and regulatory presumptions in favor of parental custody and decisionmaking authority.

Moreover, a rule of liability for social services caseworkers would place them in the untenable situation of being sued for either doing too much or too little; in the former case by parents deprived of custody even temporarily, under an aggressive policy of initiating child protective proceedings; in the latter case by children like petitioner.

Alternatively, and apart from questions of quasi-judicial absolute immunity, the failure adequately to furnish child protective services in a non-custodial context, simply is not actionable under the due process clause. Cases involving direct institutional custody, such as mental health facilities and/or prisons, are readily distinguishable. A non-custodial situation, with periodic visits or investigations of allegations of child abuse, simply lacks both the actual control, as well as the theoretical opportunity for control, which is central to the finding of liability in institutional settings of prisons or mental hygiene facilities.

More generally, as the court below recognized, governmental services which seek to monitor, supervise or regulate conduct of *third parties* cannot guarantee safety. Government may assist in the enhancement of relative safety of others, but the due process clause does not furnish a constitutional guarantee of safety from harm. There is no element of governmental "abuse of power" in this type of case, which, at most, involves a failure to furnish more or better protection from harm inflicted by third parties.

There are also other institutional concerns which counsel restraint before a broad avenue of new liability should be recognized. It will almost always be possible to state a cause of action on the pleadings if gross negligence or recklessness were deemed actionable, because almost any

error or omission can be characterized in those terms. It will almost always be possible to allege that the government, by its inaction, failed to prevent a harm perpetrated by a third party. Government, which merely provides services, will be set up as a guarantor of safety. The federalization of tort law, even in the present context, will invite a flood of new federal lawsuits across the spectrum of garden-variety personal injury actions. Moreover, the prospect of an award of attorneys' fees pursuant to 42 USC § 1988 offers a strong incentive to litigate these claims in federal court.

In short, the consequences of federalizing tort law are profound indeed. The sympathetic facts of this case cannot be denied, but sympathy should not substitute for law, especially when, as here, to do so would be to open a Pandora's Box of liability.

The judgment of the court below should be affirmed.

ARGUMENT

POINT I

This case may be decided, and the judgment below affirmed, on the narrow ground that social services caseworkers (and their supervisors) perform classic quasi-judicial tasks, and hence, are protected by absolute immunity from money damages liability.

While we believe the court below properly decided that allegations of gross negligence, aggravated misconduct, deliberate indifference or egregious misconduct in the failure to provide adequate governmental services were not actionable as a violation of due process, that question need not be answered in this case. We believe that the

judgment below can—and we suggest, should—be affirmed on an equally sound, albeit more limited ground that child protective caseworkers (and their supervisors) perform prosecutorial quasi-judicial tasks, as to which a rule of absolute immunity[1] precludes money damages liability.[2]

This Court has long held that common law immunity principles apply with equal force and effect in 42 USC § 1983 actions involving claims of constitutional deprivations. *Imbler v Pachtman*, 424 US 409, 424-426 (1976) (prosecutors); *Stump v Sparkman*, 435 US 349, 356-357 (1978) (judges); *Briscoe v LaHue*, 460 US 325, 329-336 (1983) (witnesses). In each of these cases, this Court has examined common law immunities and fashioned a rule of section 1983 damages immunity comparable to the

[1]This Court can address the immunity issue, even though it was not addressed below, for several reasons. First, in comparable circumstances, this Court granted certiorari on the broader question of whether negligent interference with an inmate's outgoing mail was actionable, but decided the case on the narrower ground of qualified immunity. *Procunier v Navarette*, 434 US 555, 559-560 & n 6 (1978). Second, the question of whether immunity defeats an otherwise actionable claim is reachable as a question incidental to those framed in the certiorari petition. *See*, Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed 1986), § 6.26. Third, the issue may be reached under the "mere enlargement" rule by which issues treated below may be expanded in this Court to encompass logically connected matters. *See Dewey v Des Moines*, 173 US 193, 198 (1899); *Illinois v Gates*, 462 US 213, 248 (1983) (White, J., concurring) (as to defenses to federal claims).

[2]This case does not appear to implicate any *genuine* issues of municipal "policy", as that term of art is discussed in the cases. *See City of St. Louis v Praprotnik*, ____ US ____, 108 S Ct 915 (1988); *Oklahoma City v Tuttle*, 471 US 808 (1985); *Pembaur v Cincinnati*, 475 US 469 (1986). Because none of the allegations in the complaint implicate any "policy" of the two municipal entity defendants, the judgment as to them should be affirmed for failure to state a cause of action. *See, Baez v Hennessy*, ____ F2d ____, No. 87-7834 (2d Cir July 27, 1988), slip opn at 5069-5074 & n 2. Accordingly, this *amicus* brief focuses on the theory of liability directed at caseworkers and their supervisors.

common law rule. With respect to absolute immunity this Court has consistently held that it is the nature of the governmental actor's *function*, not the employment title, which is the dispositive inquiry. *Butz v Economou*, 438 US 478, 515 (1978); *Imbler*, 424 US at 424-425.

Applying the common law standards which define the tasks of quasi-judicial officers, the work of child protective caseworkers and their supervisors is entitled to absolute immunity. Prosecutors and administrative agency employees performing similar tasks receive absolute immunity for several reasons. In the nature of things, errors can occur because decisions must be made, yet the facts before the decisionmaker may be tentative, sharply conflicting, or incomplete. Prosecutors and their administrative law counterparts need breathing space so they may make independent, reasoned decisions without fear of liability. *See Butz*, 438 US at 512-513. The same rationale has been held to apply to parole officers who make decisions in the field with respect to supervision and/or whether to initiate parole revocation proceedings. *Sellars v Procunier*, 641 F2d 1295, 1299-1300, 1301-1303 (9th Cir), *cert. denied*, 454 US 1102 (1981); *Evans v Dillahunty*, 711 F2d 828 (8th Cir 1983); *Pate v Alabama Board of Pardons and Paroles*, 409 F Supp 478, 479 (MD Ala 1976), *affd no opn*, 548 F2d 354 (5th Cir 1977); *Tarter v State of New York*, 68 NY2d 511, 510 NYS2d 528, 503 NE2d 84 (1986); *Nelson v Missouri Osteopathic Foundation*, 626 F Supp 604, 607 n 2 (WD Mo 1985); *see also, Hendricks v State of Oregon*, 67 Or App 453, 678 P2d 759, *lv denied*, 297 Or 228, 683 P2d 91 (1984) (same result on rationale of "discretionary function" exception to tort liability); *C.L. v Olson*, 143 Wis 2d 701, 422 NW2d 614 (1988) (same result on rationale of "public officer" immunity).[3]

[3]Moreover, as in the case of parole boards (which did not exist in the Civil War era when the predecessor to section 1983 was enacted), the courts will have to reason by analogy to decide the immunity questions, since child protective services caseworkers were not an organized profession at the time following the Civil War. *See Butz*, 438 US at 512-517; *Sellars*, 641 F2d at 1298-1299 & n 6.

The rationale which furnishes absolute immunity for prosecutors and parole officers applies with equal force to child protective caseworkers, because the same type of judgmental, deliberative decisionmaking is involved. There is no functional difference between the decisionmaking process of child protective caseworkers, parole officers and administrative agency prosecutors: each measures facts, including tentatively-determined facts, against generalized criteria (*e.g.*, constitutional, statutory and regulatory provisions) to decide whether or what sanctions, penalties or proceedings to initiate, adjudicate or terminate. Each must necessarily make inherently subjective appraisals of the credibility and reliability of witnesses and suspects. Each is equally capable of coming to the wrong conclusion in a particular case, because of flawed information, mistake in judgment or other error.

Applying the teachings of this Court that the *function* of the decisionmaker is the dispositive factor (*Butz*, 438 US at 513; *Imbler*, 424 US at 424), the majority of courts to consider the question have held that child protective caseworkers (and their supervisors) are entitled to absolute immunity from money damages liability. *Walden v Wishengrad*, 573 F Supp 1115, 1116-1117 (WDNY 1983), *affd*, 745 F2d 149, 151-153 (2d Cir 1984) (absolute immunity on analogy to prosecutorial immunity); *Whelehan v County of Monroe*, 558 F Supp 1093, 1098-1099 (WDNY 1983) (same); *Hennessey v State of Washington, Dept. of Social and Health Services*, 627 F Supp 137, 140 (ED Wa 1985) (same); *In re Scott County Master Docket*, 672 F Supp 1152, 1171 n 5 (D Minn 1987) (citing list of cases); *see also, Midamerica Trust Co. v Moffatt*, 158 Ill App 3d 372, 511 NE2d 964, 110 Ill Dec 787 (Ill App 1987) (public officer immunity precluded suit); *but see, Doe v County of Suffolk*, 494 F Supp 179, 181-182 (EDNY 1980) (caseworker entitled only to qualified immunity on analogy to police officer). Some of the considerations recognized as

justifications for absolute immunity for these caseworkers include the fact that, like prosecutors, these professionals must act under serious constraints of time and information (*Whelehan,* 558 F Supp at 1098); that the threat of liability will shade decisionmaking (*Hennessey,* 627 F Supp at 140; *Whelehan,* 558 F Supp at 1099); and that—because of the potential for many colorable claims—a standard of only qualified immunity would not adequately protect caseworkers (*Walden,* 745 F2d at 152; *Whelehan,* 558 F Supp at 1099). We agree with the reasoning in these cases and urge this Court to follow them and to adopt a rule of absolute immunity for child protective caseworkers and their supervisors.

Neither prosecutors, administrative agency prosecutors, parole officers nor child protective caseworkers are, or should be, exposed to money damages liability. Only absolute immunity affords these decisionmakers the breathing space necessary to perform their often difficult tasks free of harassment or intimidation. *Butz,* 438 US at 512-513; *Imbler,* 424 US at 422; *Walden,* 745 F2d at 151-153. Without absolute immunity, these decisionmakers will inevitably be hesitant to act decisively, particularly in difficult cases. *Butz,* 438 US at 512-513; *Imbler,* 424 US at 422-423.

For purposes of applying absolute immunity for these prosecutorial functions, it makes no difference that the decisionmaker made an error of fact, law, or judgment: absolute immunity bars all such suits. Prosser & Keeton, *Law of Torts* (5th ed 1984), § 132, p 1058. Rather, it is the nature of the *function* that is dispositive of the immunity question. *Imbler,* 424 US at 424-426.

Therefore, purely on the basis of the nature of the decisionmaker's functions, child protective caseworkers (and

their supervisors) should be entitled to absolute immunity from money damages. The judgment below should be affirmed on that basis.

POINT II

Due process is not implicated by alleged shortcomings in supervisory and monitoring services of child protective caseworkers, at least where no custodial "control" over children is involved.

A. The Custodial Cases are not Controlling

Petitioner and *amici* in support of petitioner rely heavily upon cases recognizing some due process protections against the risk of injury in a custodial context within an institution. Those cases are inapposite. There is no occasion in this case for this Court to address the scope of the due process clause in the context of such custodial situations. This Court has already addressed some of the issues in an institutional setting where residents (inmates or patients) receive care, treatment or habilitation under a roof owned by a governmental entity, and under the direct—and virtually constant—supervision of governmental employees. In those limited settings, which are not factually comparable to the case at bar, this Court has held some measure of liability exists for the protection of inmates or mental patients from harm inflicted by other residents or staff. *See Estelle v Gamble,* 429 US 97, 101-108 (1976); *Youngberg v Romeo,* 457 US 307, 314-325 (1982); *compare, Whitley v Albers,* 475 US 312 (1986) (shooting of prisoner during quelling of riot did not violate ban on cruel and unusual punishment or substantive due process absent proof of unnecessary and wanton infliction of pain).

The institutional cases stand on an entirely different footing from non-custodial situations. Because non-custodial situations neither offer the same access to information on the existence of hazards to others, nor the opportunity constantly to monitor the source of the potential harm, there is no comparable ability of governmental decisionmakers to take swift and decisive action to avert threatened harm. In an institutional setting, supervisors can more readily place potential aggressors or victims in separate housing. Furthermore, such an institution by its nature is staffed around the clock. Moreover, privacy rights of prisoners and mental patients, while they exist to some degree (*Hudson v Palmer*, 468 US 517, 521, 524 [1984]; *Youngberg*, 457 US at 315-316, 324), are considerably less of a barrier to oversight and monitoring than the parental rights in the social worker setting. Simple devices like locks on doors and TV cameras work reasonably effectively when the governmental actor owns and operates the premises; considerations of privacy, constitutional and otherwise, positively preclude such prophylactic devices in the context of governmental oversight of third parties, such as the parents of the infant petitioner.

Thus, precedents fashioning limited liability in an institutional context simply cannot form the basis for liability in the social services caseworker context. Therefore, despite the reliance by petitioner on *Youngberg* and *Estelle*, those cases do not justify the expansion of liability in these circumstances.

B. Special Factors in the Family Law Area

Whatever may be said of custodial situations, insofar as a custodial element of "control" is a factor favoring possible liability, the present case lacks even a semblance of such control. Moreover, here, there is an additional—

and compelling—countervailing consideration which counsels strongly against the recognition of any liability: the required deference to parental decisionmaking. This Court has consistently required the States to presume the right of a parent to the custody of his or her child; to prove unsuitability as a parent by clear and convincing evidence; and to defer, to a very large degree, to parental decisions about the proper upbringing of a child. *See, e.g., Santosky v Kramer*, 455 US 745, 764 (1982) (burden of proof to terminate parental rights is the high "clear and convincing evidence" standard); *Wisconsin v Yoder*, 406 US 205 (1972) (right of Amish parents to keep their children out of public school after the eighth grade); *Stanley v Illinois*, 405 US 645 (1972) (invalidating statute that conclusively presumed that unwed fathers were unfit parents and thus incompetent to raise children); *Parham v J.R.*, 442 US 584, 603 (1979) (state may voluntarily place child in mental institution at parent's request, with only informal procedures, without the necessity of adversarial proceedings with representation for the child). Collectively these and other well-established decisions limit the ability of child protective caseworkers to take decisive action in every case which hindsight shows action may have been warranted. *See Matter of Marie B.*, 62 NY2d 352, 477 NYS2d 87, 465 NE2d 807 (1984) (adjournment in contemplation of dismissal ["ACD"] of child neglect proceedings could not constitutionally be equated with unfitness of parent, even when parent voluntarily consented to ACD and indisputably violated the terms of the ACD); *In re Enis*, 121 Ill 2d 124, 520 NE2d 362, 117 Ill Dec 201 (1988) (statute authorizing termination of parental rights merely upon actual proof of physical abuse by a preponderance of evidence did not comport with due process protections for parental rights).

The cases which provide constitutional protections in favor of parental rights and parental custody demonstrate that there is no simple, automatic remedy for child protective caseworkers to employ any time there is a suspicion—or even equivocal evidence—of child abuse. Because of the procedural and substantive protections in favor of parents, child protective caseworkers must be realistic in their assessments of what type of evidence will be deemed by courts as sufficient to sustain allegations of child abuse. Moreover, it is highly doubtful that even the best-educated and properly-motivated social services caseworkers would accurately predict future parental abuse of children. The prediction of future human behavior is too inexact a science for a meaningful, workable standard of care to be articulated, much less to be applied in each case. Tyrell, *Prediction of Dangerousness*, Vol. 34, No. 1, Medical Trial Quarterly 24, 31-37 (1987) (citing extensive professional studies of the problem in the psychiatric field); *see also*, Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U Pa L Rev 75, 84 (1968).[4] Thus, it is inappropriate to impose federalized tort liability in these circumstances.

Other practical factors demonstrate that the imposition of liability against caseworkers and their supervisors would be unfair. The caseloads are staggering. To cite New York as an example, there are only about 2,000 child protective services caseworkers. Not counting existing

[4]Before courts fashion new liabilities, it is appropriate to consider whether a workable standard of care exists. For example, because it is generally agreed that no consensus exists in the educational field on the appropriate way to educate children, the courts have uniformly rejected the tort of educational malpractice. *Torres v Little Flower Children's Services*, 64 NY2d 119, 485 NYS2d 15, 474 NE2d 223 (1984), *cert. denied*, 474 US 864 (1985); *Peter W. v San Francisco Unified School Dist.*, 60 Cal App 3d 814, 131 Cal Rptr 854 (1976); *Tubell v Dade County Public Schools*, 419 So 2d 388 (Fla App 1982); *Hunter v Bd of Ed*, 292 Md 481, 439 A2d 582 (1981).

open files, the numbers of new "reports" of child abuse or maltreatment have steadily increased. There were 95,626 such complaints or reports in 1986; 105,059 in 1987; and 63,608 for the first six months of 1988. Each caseworker inevitably must make judgments about which parents are more likely to abuse their children. But, given the inability to predict future human behavior, as well as the strong presumptions in favor of parental custody and parental decisionmaking, it is simply unfair to burden social services professionals with liability for the regrettable episodes of child abuse that are not prevented.

C. Prior Precedents Do Not Support Liability And, In Fact, Demonstrate That No Liability Should Exist Here.

A review of the leading "constitutional tort" cases demonstrates that, with the possible limited exception of the prison and mental health direct custody cases (*supra*, subpoint "A", pp 11-12), the only due process theory of liability ever accepted by this Court as a justification for awarding damages has been abuse of governmental power. The cases sustaining liability have involved the use of physical force by a governmental actor against a citizen, or the use of a weapon, or some other instrumentality. Yet, in every case in which liability was upheld (either on the pleadings or after verdict), the central element of abuse of governmental authority was present. *See e.g., Home Tel. & Tel. Co. v Los Angeles*, 227 US 278, 287 (1913) (classic statement that abuse of governmental power is the central inquiry under the Fourteenth Amendment); *Monroe v Pape*, 365 US 167, 172 (1961) (police barged into home in the middle of the night, without a warrant, and forced the residents to stand naked while the officers ransacked the house); *Tennessee v Garner*, 471 US 1, 7-21 (1985) (police officer fatally shot unarmed suspect fleeing from a burglary location) (damages liability

justified under the Fourth Amendment); *see also, Screws v United States,* 325 US 91 (1945) (it is a violation of the criminal law counterpart to 42 USC § 1983 for police to beat a prisoner to death); *Johnson v Glick,* 481 F2d 1028, 1033 (2d Cir) (Friendly, J.), *cert. denied sub nom. John v Johnson,* 414 US 1033 (1973) (articulating oft-cited test of justifications for and measurement of the use of force in action by pretrial detainee against police). These cases represent proper and necessary constitutional limitations on the affirmative use of governmental power against individuals. The abuse of power rationale operates as a meaningful deterrent against ill-motivated or overly-exuberant governmental actors. The substantive due process principles governing those cases are not implicated here.

But recognition of the historic limitations which due process imposes to prevent governmental abuse of power, does not imply that liability should be imposed on the basis of an omission to furnish more or better affirmative services. There is a fundamental and dispositive distinction between these two types of cases. These distinctions are ably described in Judge Posner's opinion in the case at bar, *DeShaney v Winnebago County,* 812 F2d 298, 301-304 (7th Cir 1987), and in the other lower court decisions cited at page 301. *See also,* Currie, *Positive and Negative Constitutional Rights,* 53 U Chi L Rev 864 (1986); *McClary v O'Hare,* 786 F2d 83, 88-89 (2d Cir 1986) (action for wrongful death could not be maintained as federal civil rights claim, where the event was an accident, neither the occurrence of which nor the particular victim of which could have been predicted); *Walker v Rowe,* 791 F2d 507, 509-512 (7th Cir), *cert. denied,* 107 S Ct 597 (1986) (due process does not require a state to provide its employees with safe working conditions or to protect them from murderers).

Petitioner and *amicus* on his behalf place considerable, but misplaced, reliance on the common law precept of "special relationships". Citing the Third Circuit decision in *Estate of Bailey by Oare v County of York,* 768 F2d 503 (3d Cir 1985), petitioners equate knowledge of potential risk with a constitutional duty to prevent the harm. That theory simply has no place in the due process jurisprudence. The better view is that due process does not embrace a governmental obligation, to be honored at the peril of constitutional tort damages, to protect citizens from crime. Judge Posner's thoughtful opinion for the Seventh Circuit in this case explains that due process is not a mandate for the government to provide services to its citizens; rather, it is generally viewed as a limitation against arbitrary or abusive exercises of governmental power. *DeShaney,* 812 F2d at 303-304. Other lower courts that have addressed this or related concerns have similarly concluded that state tort remedies, not section 1983 lawsuits, are the appropriate remedy for injured persons. *See, e.g., Harpole v Arkansas Dept. of Human Services,* 820 F2d 923, 928 (8th Cir 1987) (governmental social services caseworker who misjudged ability and fitness of parent to care for child with physical ailments was not liable to grandparent on special relationship theory); *Wells v Walker,* 671 F Supp 624, 626-627 (ED Ark 1987) (person injured by parolee); *Jones v Phyfer,* 761 F2d 642 (11th Cir 1985) (person injured by furloughed prisoner); *see also, Daniels v Williams,* 474 US 327, 335-336 (1986) (alternative holding or dictum which rejects the common-law "special relationship" test of Restatement, Second, of Torts § 314, as a basis for a constitutional tort under the due process clause).

In any event, the purported constitutional tort theory advanced by petitioner should be rejected for the further reason that it would extend liability even beyond common

law bounds. Section 319 of the Restatement, Second, of Torts permits a court to find a "special relationship" only if real—rather than conjectural and indirect—control (absent here) existed. *See Sherrill v Wilson,* 653 SW2d 661, 666-667 (Mo 1983); *Payton v United States,* 679 F2d 475, 479-483 (5th Cir 1982); *see also, Purdy v Public Administrator of County of Westchester,* 72 NY2d 1, 1988 WL 53002 (1988) (operators of health care facility did not have enough "control" over conduct of voluntary patient to justify liability for tort committed by patient off the premises).

Finally, even if the Court were inclined to recognize a duty in the present context, we suggest that permitting a section 1983 cause of action would tend to convert this civil rights statute into a broadly-based federal tort remedy. While this Court has not yet spoken to the issue of constitutional tort liability couched in terms of recklessness or gross negligence (*see Daniels v Williams,* 474 US 327, 334 n 3 [1986]), it has consistently declined to transform section 1983 into a generalized federal tort law doctrine. *See Daniels,* 474 US at 329-332 (reiterating "abuse of power" doctrine as core-value of the due process clause; holding that mere negligence of sheriff's deputy leading to injury to prisoner was not a violation of due process); *Davidson v Cannon,* 474 US 344, 347-348 (1986) (negligent failure to protect one inmate from attack by another, even in the face of notice of a specific threat by an identified inmate to another identified inmate, was not actionable as a violation of due process); *Youngberg v Romeo,* 457 US 307, 317 (1982) (there is no generalized constitutional duty of government to furnish substantive services); *Baker v McCollan,* 443 US 137 (1979) (incarceration of wrong defendant, on account of negligently-caused misidentification, was not actionable); *Paul v Davis,* 424 US 693, 699-701 (1976) (circulation to

merchants of plaintiff's name and picture, on police list of "active shoplifters", even after such charges had been dismissed, amounted only to a state tort of defamation, not a violation of constitutional due process); *Martinez v California,* 444 US 277, 281, 283-285 (1980) (state statute conferring a defense to potential state tort law liability, which arguably resulted in negligent release of dangerous parolee, did not result in a deprivation of due process). As then-Justice (now Chief Justice) Rehnquist reasoned in *Baker,* 443 US at 146:

> "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as '[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,' *Estelle v Gamble,* 429 US 97, 106 (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official."

There simply is no sound basis for federalizing tort law. There is a jurisprudential problem of drawing the line for liability at an appropriate and workable boundary. As then-Judge (later Chief Judge) Breitel of the New York Court of Appeals stated:

> "Beyond practical difficulties there is a limit to attaining essential justice in this area. While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree."

Tobin v Grossman, 24 NY2d 609, 619, 301 NYS2d 554, 561, 249 NE2d 419, 424 (1969). Those observations are equally applicable here.

There are several practical problems that counsel against the recognition of liability on theories of gross negligence or recklessness. It would almost always be possible to state a cause of action on the pleadings. *Archie v City of Racine,* 847 F2d 1211, 1219 (7th Cir 1988) (en banc) (extensive review of cases, noting that no workable distinctions have yet been offered in this area, and concluding that "[a] line that cannot be policed is not a line worth drawing in constitutional law").

And, as history has demonstrated in the personal injury area, the recognition of a novel duty leads to further, expanded liability. Social services caseworkers are already being sued by parents who allege that child removal proceedings were commenced on flimsy or inadequate evidence. *See, e.g., In re Scott County Master Docket,* 672 F Supp at 1194, 1198-1199; *see also, Smith v Eley,* 675 F Supp 1301, 1303-1306 (D Utah 1987) (action by custodial parent against county sheriff and deputy for assisting former spouse in gaining physical custody of child). It is no exaggeration to suggest that every garden-variety matrimonial matter with a fight over child custody could become a federal lawsuit.

The possibilities of new avenues of federalized tort law are merely unleashed, and certainly not exhausted, by the family law area. Every other aspect of governmental services could become an inviting target for a federal lawsuit in the name of due process.

CONCLUSION.

The judgment should be affirmed.

Dated: Albany, New York
August 9, 1988

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for The State of New York
as *Amicus Curiae*

O. PETER SHERWOOD
Solicitor General
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

MICHAEL S. BUSKUS
Assistant Attorney General

of Counsel

Supreme Court, U.S.
FILED
AUG 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

(10)

No. 87-154

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSHUA DESHANEY, a Minor, by his Guardian ad litem, and MELODY DESHANEY,

Petitioners,

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, WINNEBAGO COUNTY, ANN KEMMETER and CHERYL STELSE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DOUGLAS A. POE
KENNETH E. WILE
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Due Process Clause imposes a duty on county welfare agencies and their employees to provide child protective services in an adequate manner.

2. Whether gross negligence or recklessness on the part of county officials in providing protective services can constitute a deprivation of rights under the Due Process Clause.

3. Whether local government liability under 42 U.S.C. § 1983 can be predicated on a subordinate official's violation of government policy.

4. Whether the individual respondents are protected by official immunity from Section 1983 liability for a novel constitutional violation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	3
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE DUE PROCESS CLAUSE IMPOSES NO DUTY TO PROVIDE SOCIAL SERVICES IN AN ADEQUATE MANNER	6
A. The "Special Relationship" Doctrine Does Not Furnish A Constitutional Basis For Imposing Affirmative Duties On State And Local Governments	8
B. Petitioners' Claims Threaten An Extreme And Unwarranted Intrusion Into The Traditional Role Of The States	13
1. *Family law concerns are matters for the States to resolve*	14
2. *The federal courts should not reallocate expenditures in state social welfare budgets*	17
3. *Reversal would create a generalized constitutional right to government protective services*	18
II. THE COURT SHOULD NOT TRIVIALIZE THE DUE PROCESS CLAUSE BY PERMITTING SECTION 1983 ACTIONS TO PROCEED TO TRIAL ON ALLEGATIONS OF GROSS NEGLIGENCE OR RECKLESSNESS	19

TABLE OF CONTENTS—Continued

	Page
III. NO POLICY HAS BEEN SHOWN TO ESTABLISH THE COUNTY'S LIABILITY UNDER *MONELL v. DEPARTMENT OF SOCIAL SERVICES*	23
IV. THE INDIVIDUAL RESPONDENTS ARE ENTITLED TO OFFICIAL IMMUNITY	25
CONCLUSION	27

TABLE OF AUTHORITIES

CASES:	Page
A.L. v. Commonwealth, 521 N.E.2d 1017 (Mass. 1988)	8
Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988) (en banc)	18
Austin v. Borel, 830 F.2d 1356 (5th Cir. 1987)	26
Baker v. McCollan, 443 U.S. 137 (1979)	9
Board of Regents v. Roth, 408 U.S. 564 (1972)	13
Brown v. Board of Education, 347 U.S. 483 (1954)	16
City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985)	25
City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988)	24, 25
City of Springfield v. Kibbe, 107 S. Ct. 1114 (1987)	20
The Civil Rights Cases, 109 U.S. 3 (1883)	6
Commonwealth Bank & Trust Co. v. Russell, 825 F.2d 12 (3d Cir. 1987)	18
Dandridge v. Williams, 397 U.S. 471 (1970)	23, 26
Daniels v. Williams, 474 U.S. 327 (1986)	*passim*
Davidson v. Cannon, 474 U.S. 344 (1986)	20, 21, 23
Doe v. New York City Dep't of Social Services, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983)	8, 19
Donald M. v. Matava, 668 F. Supp. 703 (D. Mass. 1987)	26
Drabek v. Sabley, 142 N.W.2d 798 (Wis. 1966)	17
Estate of Bailey v. County of York, 768 F.2d 503 (3d Cir. 1985)	8, 9, 26
Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir.), *cert. denied*, 107 S. Ct. 270 (1986)	8
Estelle v. Gamble, 429 U.S. 97 (1976)	20, 22
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	26
Harpole v. Arkansas Dep't of Human Services, 820 F.2d 923 (8th Cir. 1987)	8, 26
Harris v. McRae, 448 U.S. 297 (1980)	7, 13
Hogan v. City of Houston, 819 F.2d 604 (5th Cir. 1987)	21
Hoover v. Ronwin, 466 U.S. 558 (1984)	13

TABLE OF AUTHORITIES—Continued

	Page
Hutto v. Finney, 437 U.S. 678 (1978)	12
Ingraham v. Wright, 430 U.S. 651 (1977)	12
Jensen v. Conrad, 747 F.2d 185 (4th Cir.), *cert. denied*, 470 U.S. 1052 (1984)	8, 26
Kadrmas v. Dickinson Public Schools, 108 S. Ct. 2481 (1988)	7
Lehman v. Lycoming County Children's Services Agency, 458 U.S. 502 (1982)	11, 16
Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982)	15
Lossman v. Pekarske, 707 F.2d 288 (7th Cir. 1983)	17
Martinez v. California, 444 U.S. 277 (1980)	7, 9, 18
Monell v. Department of Social Services, 436 U.S. 658 (1978)	*passim*
Parratt v. Taylor, 451 U.S. 527 (1981)	19
Paul v. Davis, 424 U.S. 693 (1976)	9, 21
Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)	25
Pennoyer v. Neff, 95 U.S. (5 Otto) 714 (1878)	14
Polk County v. Dodson, 454 U.S. 312 (1981)	24
Rose v. Rose, 107 S. Ct. 2029 (1987)	14
Screws v. United States, 325 U.S. 91 (1945)	9
The Slaughter-house Cases, 83 U.S. (16 Wall.) 36 (1873)	6
Smith v. Wade, 461 U.S. 30 (1983)	20, 21
Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (en banc), *pet. for cert. filed*, 56 U.S.L.W. 3290 (U.S. Sept. 25, 1987) (No. 87-521)	8, 19
Thompson v. Thompson, 108 S. Ct. 513 (1988)	14, 15
Washington v. District of Columbia, 802 F.2d 1478 (D.C. Cir. 1986)	8, 21
West v. Atkins, 108 S. Ct. 2250 (1988)	20
Whitley v. Albers, 475 U.S. 312 (1986)	22
Wideman v. Shallowford Community Hospital, Inc., 826 F.2d 1030 (11th Cir. 1987)	18
Wilson v. Brett, 152 Eng. Rep. 737 (Ex. 1843)	21
Wolff v. McDonnell, 418 U.S. 539 (1974)	20
Youngberg v. Romeo, 457 U.S. 305 (1982)	7, 11, 14

CONSTITUTIONAL PROVISIONS: Page

U.S. Const. Amend. V, Due Process Clause	7
U.S. Const. Amend. XIV, Due Process Clause	*passim*
U.S. Const. Amend. XIV, Equal Protection Clause	16

STATUTES:

28 U.S.C. § 1738A	15
28 U.S.C. § 2254	11
42 U.S.C. § 1983	*passim*
Wis. Stat. Ann. § 48.01 *et seq.* (1987)	13
Wis. Stat. Ann. § 48.981(3)(b) (1987)	12
Wis. Stat. Ann. § 893.80(3) (1987)	16

OTHER AUTHORITIES:

Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 Harv. Civ. R.-Civ. L. L. Rev. 199 (1988)	15
W. Prosser & W. Keeton, *The Law of Torts* (5th ed. 1984)	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-154

JOSHUA DESHANEY, a Minor, by his Guardian ad litem, and MELODY DESHANEY,

Petitioners,

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, WINNEBAGO COUNTY, ANN KEMMETER and CHERYL STELSE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

Amici are concerned that a reversal in this case would vastly expand the liability of state and local governments under 42 U.S.C. § 1983. Petitioners seek to hold the County and individual child welfare professionals liable because they did not prevent the severe abuse of a child by his father, the child's lawful custodian. *Amici* and their members are deeply concerned about Joshua DeShaney and other victims of the senseless cruelty of child abuse. The brutality of Randy DeShaney and the severity of Joshua's injuries, however, should not be permitted to obscure the underlying legal issue: whether the County is constitutionally liable for the father's crime because a social worker failed to take some action that might have prevented injuries to the child.

Private violence, no matter how severe or how tragic the consequences, is still private violence. Petitioners' claims cannot be upheld unless the Court abrogates important limitations on the liability of local governments under Section 1983, as well as the official immunity of local government officials. Further expansion of Section 1983 liability to include claims far removed from the core concerns of the Due Process Clause would divert ordinary state law tort claims to the federal courts and impose substantial additional costs on state and local governments.

Amici are also concerned that a reversal would result in a mandate under Section 1983 empowering the federal courts to address child abuse and other family law issues that are the recognized province of state and local governments. Child abuse is one of the grave problems of our society that governments at all levels are grappling with today. The discretion of those governments to address child abuse, or similar social problems, should not be controlled by a federal common law of social work or curtailed by the threat of litigation every time a tragedy occurs.

Amici submit that the decision below is correct. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

Petitioners Joshua and Melody DeShaney brought this action under 42 U.S.C. § 1983, claiming that they were deprived of their liberty without due process of law by respondents because social worker Ann Kemmeter; her supervisor, Cheryl Stelse; her employer, the Winnebago County Department of Social Services; and Winnebago County failed to intervene effectively in a case of suspected child abuse. Finding no constitutional basis for these claims, the district court entered summary judgment in favor of respondents. The court of appeals affirmed.

Joshua DeShaney was born in Wyoming in 1979. In December 1980, a Wyoming court awarded Randy DeShaney custody of Joshua following Mr. DeShaney's divorce from Melody DeShaney. Randy DeShaney thereafter moved with his son to Winnebago County, Wisconsin. In March 1984, while in his father's custody, Joshua was brutally beaten by his father and suffered critical brain injuries.

Respondent Ann Kemmeter's involvement with Randy and Joshua DeShaney began in January 1983, when Randy's girlfriend Marie DeShaney (Joshua's half-aunt) brought Joshua, covered with bruises, to Theda Clark Regional Medical Center. Marie DeShaney stated that another child had inflicted the bruises, but the emergency room staff suspected child abuse and alerted respondent Winnebago County Department of Social Services (the "Department").

---

[1] The parties' letters of consent, pursuant to Rule 36 of the Rules of the Court, have been filed with the Clerk.

By the end of the day, the Department had obtained an order placing Joshua in the temporary custody of the Medical Center. The Department convened a "child protective team" consisting of a pediatrician, a psychologist, a police detective, a lawyer for respondent Winnebago County (the "County"), and respondents Kemmeter and Stelse. The county attorney concluded that there was insufficient evidence of child abuse to retain Joshua in county custody; and he was therefore returned to his father. As the court of appeals observed, there is no evidence that the Department was reckless in making this decision. Pet. App. 42-43.

Although the child-protection case was closed three weeks later, respondent Kemmeter made periodic visits to the DeShaney household and maintained a file on Joshua. Ms. Kemmeter was aware that Joshua had suffered repeated suspicious injuries, although, in each instance, Randy DeShaney offered an innocent explanation. Ms. Kemmeter's last visit occurred on March 7, 1984, when Randy DeShaney informed her that Joshua had fainted in the bathroom several days earlier for no apparent reason. Ms. Kemmeter did not ask to see Joshua.

The following day, Randy DeShaney beat his son so severely that the child suffered grave neurological damage and was hospitalized. Respondents subsequently placed Joshua in a foster home for profoundly retarded children. Randy DeShaney was convicted of child abuse and sentenced to prison.

SUMMARY OF ARGUMENT

On its face, the question whether a county social welfare agency adequately implemented the State's child welfare program is a question of state law for state courts. Petitioners cannot succeed in constitutionalizing this question without vastly expanding the liability of local government agencies and officials. Reversal in this

case would require that the Court radically alter at least four principles that limit such liability under Section 1983.

First, the Due Process Clause acts to restrict the powers of government, not to impose upon it affirmative duties to provide social welfare services. Petitioners ask the Court to impose on government welfare agencies an affirmative constitutional duty to prevent child abuse when they are aware of a risk to a child. The Constitution provides no source for this affirmative duty, particularly in this case, where Joshua DeShaney was not in the County's custody, but in the legal and physical custody of his abusive father.

Even if petitioners' claims could be grounded in the Constitution, recognition of those claims would entail an extraordinary and unwarranted intrusion into areas of fundamental state concern. This Court has recognized the primacy of the States in dealing with issues of family law, and the federal courts are ill-suited to make these decisions. Nor is it sound policy to subject the decisions of county welfare workers to the *ex post facto* scrutiny of the federal courts. Finally, there is no principled basis for distinguishing child welfare services from other protective services. As a result, reversal in this case could constitutionalize analogous duties of other government employees, including parole officers, police officers, and paramedics.

Second, even if petitioners could show a constitutional right to official protection from private violence, they could not pursue a claim of deprivation based on, at most, allegedly reckless conduct. The language and jurisprudence of the Due Process Clause limit violations to conduct that can fairly be called intentional. To hold otherwise would permit the negligence claims prohibited by *Daniels v. Williams*, 474 U.S. 327 (1986), to be pursued at least to trial—and frequently to judgment—under the guise of gross negligence or recklessness.

Third, petitioners can recover against the County and the Department only on the theory of respondeat superior liability, which has been repeatedly disavowed by the Court. Petitioners rely on respondent Kemmeter's infractions of County policy as the basis for their due process claims. They cannot also assert that the same policy, if followed, would have caused a due process violation, as required by *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Petitioners are further precluded from establishing liability under *Monell* because (a) the County's policy is constitutional, a point that petitioners do not dispute, and (b) their claims are based on a single episode of alleged misconduct.

Finally, the doctrine of official immunity protects the individual respondents from liability. Child welfare workers, as executive officials, are entitled to qualified immunity for discretionary actions taken in good faith. Because the individual respondents could not have anitcipated that they had a federal constitutional duty to prevent child abuse, their conduct fell within the scope of qualified immunity.

ARGUMENT

I. THE DUE PROCESS CLAUSE IMPOSES NO DUTY TO PROVIDE SOCIAL SERVICES IN AN ADEQUATE MANNER.

The Due Process Clause does not impose affirmative duties on the States. It is, instead, "a restraint upon the power of the States." *The Slaughter-house Cases*, 83 U.S. (16 Wall.) 36, 80 (1873). *The Civil Rights Cases*, 109 U.S. 3, 11 (1883), recognized that, under the Due Process Clause, "[i]t is State action of a particular character that is prohibited." In holding that only state action violates the Constitution, the Court specifically observed that "individual invasion of individual rights is not the subject-matter of the amendment." *Id.* The fundamental understanding of the Constitution as a limitation on the power of the States, not a mandate of affirmative duties, continues to the present. *See, e.g., Kadrmas v. Dickinson Public Schools*, 108 S. Ct. 2481, 2489 (1988); *Youngberg v. Romeo*, 457 U.S. 305, 317 (1982); *Harris v. McRae*, 448 U.S. 297, 318 (1980).

The government's "duty" to protect members of the public at large from private violence is one such affirmative obligation not found in the Constitution. As petitioners and their *amici* recognize, the Constitution does not impose such a generalized duty on the government. Pet. Br. at 12-13; Brief *Amicus Curiae* of the American Civil Liberties Union, *et al.* (hereinafter "ACLU" and "ACLU Br."), at 9. *See Martinez v. California*, 444 U.S. 277, 284-85 (1980). At least in the absence of physical custody of the claimant, as in *Youngberg v. Romeo*, 457 U.S. at 317 (involuntarily committed mental patients), there is no basis under the Constitution for requiring state and local governments to provide any services, regardless of what state law may require.

It is undisputed that respondents did not injure Joshua DeShaney. Joshua was critically injured by his father, and petitioners do not contend that Randy DeShaney's brutal acts can be directly attributed to respondents. Thus, petitioners' claim depends on the existence of an affirmative obligation of government under the Due Process Clause[2] to protect suspected victims of child abuse from the violence of their own parents, an obligation that cannot be squared with the Court's consistent view of that Clause as a limitation on power and not an affirmative grant of rights. Moreover, although petitioners have identified certain characteristics of child protective services that distinguish them from other government pro-

---

[2] Our reference throughout is to the Due Process Clause of the Fourteenth Amendment, although the Due Process Clause of the Fifth Amendment would subject federal agencies and officials to the same liability if petitioners' arguments were accepted.

grams, none of these distinctions provides a *constitutional* basis for thrusting the federal courts into the province of state and local governments or burdening those governments with costly new obligations to provide adequate social services.

A. The "Special Relationship" Doctrine Does Not Furnish A Constitutional Basis For Imposing Affirmative Duties On State And Local Governments.

To subject state and local governments to new affirmative duties, petitioners rely on court of appeals decisions creating a doctrine of "special relationships." Under these cases, certain factors can compel governments to provide protective social services to potential victims of private violence. These factors are primarily (a) the expressed desire to protect a particular class of individuals; (b) knowledge of the victim's plight; and (c) legal custody. See Pet. Br. at 14, citing *Jensen v. Conrad*, 747 F.2d 185, 194-95 n.11 (4th Cir.), *cert. denied*, 470 U.S. 1052 (1984).[3]

As applied to this case, none of the "special relationship" factors have constitutional significance, whatever their significance under state law.[4] The government's

[3] This line of cases includes *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), *pet. for cert. filed*, 56 U.S.L.W. 3290 (U.S. Sept. 25, 1987) (No. 87-521); *Estate of Bailey v. County of York*, 768 F.2d 503 (3d Cir. 1985); *Doe v. New York City Dep't of Social Services*, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983).

Like the courts below, other circuits have rejected the doctrine. *See Harpole v. Arkansas Dep't of Human Services*, 820 F.2d 923 (8th Cir. 1987); *Washington v. District of Columbia*, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986); *Estate of Gilmore v. Buckley*, 787 F.2d 714 (1st Cir.), *cert. denied*, 107 S.Ct. 270 (1986). *Harpole* involved facts virtually identical to those presented here.

[4] Massachusetts, for example, has developed a doctrine of special relationships under its common law, without any reliance on the Due Process Clause. *See A.L. v. Commonwealth*, 521 N.E.2d 1017 (Mass. 1988).

generalized desire to protect a class of individuals has no constitutional relevance whatsover. Because that desire will be present in all social programs intended to protect citizens, it provides no meaningful limit on the kinds and extent of affirmative obligations that would be created. Moreover, this Court has repeatedly held that a State's deprivation of state-created rights does not violate the Due Process Clause unless those rights amount to a constitutionally protected property interest. *See, e.g., Baker v. McCollan*, 443 U.S. 137 (1979); *Paul v. Davis*, 424 U.S. 693 (1976); *Screws v. United States*, 325 U.S. 91 (1945). *A fortiori*, a mere expressed intent to protect a class—even if accompanied by a procedure to facilitate protection—does not create a constitutional right to protection. To hold otherwise would convert every government social service, and possibly every statement of policy, into a constitutional right.

The second factor, knowledge of the victim's plight, also cannot impose on government an affirmative duty to protect. Surprisingly, the authority cited for this factor is the Court's failure to reach this question in *Martinez v. California*, 444 U.S. 277 (1980). *See, e.g., Estate of Bailey v. County of York*, 768 F.2d 503, 510 (3d Cir. 1985). *Martinez* held that the California Parole Board could not be liable under the Due Process Clause for a murder committed by a parolee five months after his release on parole. In limiting the scope of its ruling, the Court, noting that the Board was unaware of the danger to a particular victim, stated that, "[w]e need not *and do not decide* that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole." 444 U.S. at 286 (emphasis added). Some lower courts have nonetheless taken this considered refusal to speculate as an established principle supporting imposition of liability.

Analytically, knowledge of a risk to an identified person is of no greater constitutional significance than a generalized intent to benefit the class to which that person belongs. The suggestion that knowledge creates the duty is an impermissibly circular proposition; the constitutional duty defines the weight, if any, to be given to knowledge.

Moreover, to hold that knowledge of a risk is sufficient to create a constitutional duty would extend the reach of the Due Process Clause in a revolutionary manner. Many government agencies, especially police departments, fire departments, and child welfare agencies, compile files identifying potential victims at risk. Because of their limited resources, these agencies are daily asked to assign priorities among these risks. Liability based on knowledge of a risk would render any failure by these agencies to provide adequate protective services actionable. But the Due Process Clause has never been thought to mandate supervision by the federal courts of decisions made in the face of potential risks.

The final factor, legal custody, is not present in this case.[5] Were it present, it would not require a different result. Legal custody is insufficient to impose affirmative federal constitutional duties on the government, unless it is accompanied by physical custody that impinges on the liberty interests of the citizen. Legal custody is insuffi-

[5] The initial decision granting Randy DeShaney custody of his son was made in Wyoming, not Wisconsin. The child was in temporary state custody in Wisconsin only during the period of his hospitalization in January 1983. At that time, the hospital convened a team of doctors and social workers that determined that there were insufficient grounds for terminating Randy DeShaney's parental rights. The court of appeals held that this decision was not reckless (Pet. App. 42-43), and there is no evidence that this determination was even negligent.

cient because state law determines legal custody and its legal significance. For example, the State may retain legal custody of an orphan who is placed with foster parents. Yet, if the State relinquishes parental responsibilities to the foster parents under state law, no liberty interest of the child is impinged once the child has been properly placed. *See Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 510-11 (1982). In *Lehman*, the Court noted that, for purposes of federal habeas corpus under 28 U.S.C. § 2254, foster children "are in the 'custody' of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents. . . . [T]hey suffer no unusual restraints not imposed on other children."

This Court has recognized that certain responsibilities may attach under the Due Process Clause where the State has physical custody.[6] In *Youngberg v. Romeo*, 457 U.S. 305 (1982), a suit by an involuntarily committed mental patient, the Court explicitly premised the State's duties on its preexisting deprivation of the patient's liberty:

> As a general matter, a State is under no constitutional duty to provide substantive services for those within its border. When a person is institutionalized—and wholly dependent on the State—it is conceded by petitioners that a duty to provide certain services and care does exist, although even then a

[6] Even the ACLU recognizes, although it rejects, "the attractiveness of [physical] custody as a bright line for determining the limits of liability." ACLU Br. at 44. In fact, physical custody is a necessary but not a sufficient condition for recovery. The Fourteenth Amendment does not constitutionalize all common law duties owed to a person in custody. *See Daniels v. Williams*, 474 U.S. 327, 332 (1986).

> State necessarily has considerable discretion in determining the nature and scope of its responsibilities.

Id. at 317 (citations omitted).[7] *See also Hutto v. Finney*, 437 U.S. 678 (1978) (Eighth Amendment case involving state prisoners).

These cases depend on the concept that government, when it deprives a person of liberty and the inherent capacity for self-protection, assumes the responsibility to minimize other intrusions into protected liberty interests. Absent that preexisting deprivation, there is no constitutional basis for imposing affirmative duties.

Petitioners assert that it would be appropriate to impose affirmative constitutional duties in this case because respondents' authority under Wisconsin law "preempted" the rescue efforts of others. Their assertion is simply incorrect. Neither respondents nor the Wisconsin Children's Code prevented neighbors, police, or petitioner Melody DeShaney, Joshua's mother, from investigating or reporting his condition. In fact, the Children's Code mandates that the sheriff or police must immediately investigate allegations of child abuse upon request. Wis. Stat. Ann. § 48.981(3)(b) (1987). Petitioners identify no evidence that Melody DeShaney was aware of respondents' involvement with Joshua or that anyone else failed to report, investigate, or restrain Randy DeShaney because they relied on the Department.

Even if there were evidence of reliance on the Department, petitioners could not show a deprivation of constitutional rights because they have no entitlement to the

---

[7] The ACLU cites *Ingraham v. Wright*, 430 U.S. 651 (1977), which limited corporal punishment of school children. Although *Ingraham* recognized a liberty interest in freedom from government intrusions on personal security (*id.* at 673), the remedy was to restrain action by the State, not to require the State to prevent the violence of others. Moreover, school children are compelled by law to attend school and are in the physical custody of the State while there.

intervention of others. There is no constitutional right to government social services (*Harris v. McRae*, 448 U.S. at 317-18), much less to the services of private citizens. And even if state law imposes a duty of care on a would-be rescuer who preempts the rescue efforts of others, there is no basis for transforming this common law principle into a constitutional right.

In the end, petitioners seek to create a constitutional violation out of respondents' shortfall in achieving their own aspirations, namely to prevent child abuse. The Due Process Clause does not transform those aspirations into constitutional duties.[8]

B. Petitioners' Claims Threaten An Extreme And Unwarranted Intrusion Into The Traditional Role Of The States.

To hold that the Due Process Clause imposes widespread affirmative duties "would mark a drastic change in our understanding of the Constitution." *Harris v. McRae*, 448 U.S. at 318. Because there is no constitutional foundation for these duties, it is not necessary to demonstrate why the harm to state and local governments of a reversal would drastically outweigh any social good from such a decision. Yet, the weakness of petitioners' claim is underlined by identifying only the most obvious effects of reversal on the administration of state social services.[9]

---

[8] In this Court, petitioners argue for the first time that they had an "entitlement" under the Due Process Clause to the social services mandated by the Wisconsin Children's Code, Wis. Stat. Ann. § 48.01 *et seq.* (1987). Because this procedural due process argument (*see Board of Regents v. Roth*, 408 U.S. 564, 570 (1972)) was not presented for decision in the lower courts, it cannot furnish a basis for reversal here. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984). In any event, petitioners cannot transmogrify *Roth* into a constitutional entitlement to social services without rendering the entire spectrum of state social services subject to federal regulation.

[9] Even when a deprivation of a protected liberty interest has been shown, the Court will compare the burdens imposed on the State

1. *Family law concerns are matters for the States to resolve.*

The law of family relationships remains, as it always has been, a concern of state law. *See, e.g., Thompson v. Thompson*, 108 S. Ct. 513, 520 (1988); *Rose v. Rose*, 107 S. Ct. 2029 (1987); *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 734-35 (1878). Many of the decisions affecting family relationships are made by specialized state family or juvenile courts that deal with these issues on a daily basis.

Allowing petitioners to bring their claims under the Due Process Clause would inescapably turn federal courts into alternative and highly inappropriate domestic relations forums. Petitioners' claims would turn, at trial, on whether respondents provided adequate child welfare services to Joshua DeShaney. Yet, as the Court has repeatedly observed (most recently in *Thompson v. Thompson*, 108 S. Ct. at 520), the federal courts "have little expertise to resolve" family law issues. It is doubtful that federal judges ever could gain sufficient expertise. No federal judge would want, let alone see, sufficient numbers of cases to be able to place the behavior of a given social worker or parent in context. As the court of appeals explained below:

> Balancing the rights of parents with those of their children is a task as difficult as it is delicate, and we doubt that it will be performed better under the eyes of federal courts administering constitutional law than by the state judicial and administrative authorities. "The federal courts . . . are not local institutions, they do not have staffs of social workers, and there is too little commonality between family law adjudication and the normal responsibilities of federal judges to give them the experience they would need to be able to resolve domestic disputes with skill and sensitivity." *Lloyd v. Loeffler*, 694 F.2d 489, 492 (7th Cir. 1982).

Pet. App. 44.

The ACLU has inadvertently emphasized the difficulty. To support the doubtful proposition (discussed below) that federal liability would not unduly affect the actions of social workers, it sets forth "generally accepted standards in child protection" that the federal courts would be called on to apply. ACLU Br. at 36; see *id.* at 37-38 (identifying sources of "authoritative standards"). But to apply these standards in the difficult cases that come to trial, the federal courts would have to create a federal common law governing social services.

Thompson demonstrates a related problem. In *Thompson*, the petitioner filed suit in federal court under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, to overturn an adverse state court custody decision. Holding that no right of action could be implied, the Court indicated that the federal courts should not resolve "traditional domestic-relations inquiries," including whether "the child has been abandoned or abused." 108 S. Ct. at 520 n.4. Petitioners' claims would require the federal courts to make precisely this type of inquiry. Moreover, because injunctive relief is available under Section 1983, federal courts could be asked to override the custody decisions of state agencies at the time those decisions are made, as well as to second-guess them after they are made, as in this case.[10]

---

and the individual before finding a constitutional violation. *See Youngberg v. Romeo*, 457 U.S. at 322-23.

[10] The availability of injunctive relief could lead to even greater federal intrusion. One author cited by the ACLU has asserted the desirability of "structural injunctions" to reform the provision of social services to children. See Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 Harv. Civ. R.-Civ. L. L. Rev. 199 (1988). Such injunctions would deprive state and local governments of their freedom to determine for themselves how the difficult problem of child abuse should be addressed.

There simply is no imperative for pushing these cases into federal court.[11] While any incident of child abuse is disturbing, there is no evidence that victims of child abuse are disfavored under state law or victims of bias in state courts.[12] The detailed Wisconsin statutory scheme upon which petitioners rely is persuasive evidence to the contrary.

In reality, intervention by the federal courts could well undermine the quality of government social services. The standards governing social work would be determined exclusively by an adversary process, never intended to determine sound policy and easily manipulated by clever counsel. The decisions of the federal courts would not only dictate the standards a social worker must follow at her peril, but would lead to new bureaucratic requirements so that the social worker could document her adherence to such standards. The prospect of unlimited federal court judgments against individual social workers and their agencies may well ensure adherence to whatever federal standards are decreed, but will also deter social workers from acting on their "honest judgment" that the best interests of the child require other action. *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. at 514 n.18.[13]

---

[11] In this case, the only purported inadequacy of state court remedies identified by petitioners is Wisconsin's $50,000 limitation on damage awards against respondents. See Wis. Stat. Ann. § 893.80(3) (1987). Petitioners, however, have not challenged the constitutionality of this limitation. If the limitation is valid, no purpose is served by allowing petitioners to use Section 1983 to circumvent the statute.

[12] The Equal Protection Clause serves to prevent state and local governments from refusing to provide services for invidious reasons such as racial discrimination. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954).

[13] For example, if petitioners prevail here, it would be an intrepid social worker who would fail to insist on seeing a child on any home visit, even if the refusal to accept a parent's assertion that the child

The court of appeals detailed an additional dilemma (Pet. App. 44-45). Child welfare workers already face potential liability under state and possibly federal law if they improperly remove a child from a parent's custody. *See, e.g., Lossman v. Pekarske*, 707 F.2d 288, 290 (7th Cir. 1983); *Drabek v. Sabley*, 142 N.W.2d 798 (Wis. 1966). Social work is sufficiently difficult without the threat of liability whether the child remains with his parent or is removed from the parent's custody. There is certainly no federal constitutional basis for creating an incentive to terminate parental custody which, unlike state social services, is a fundamental constitutional right.

2. *The federal courts should not reallocate expenditures in state social welfare budgets.*

Constitutional liability for allegedly incompetent social work could diminish the availability as well as the quality of state social services. Given the disturbing facts of any child abuse case, million-dollar verdicts against government agencies and officials are likely. These verdicts, as well as litigation costs incurred regardless of the verdict, would necessarily direct state expenditures away from the provision of services. Such reallocation is a policy matter for state legislatures, not the federal courts.[14]

The threat of litigation costs diminishing the availability of social services is real. *Amici* regretfully acknowledge that child abuse is all too prevalent in this country, despite the best efforts by state and local governments to prevent it. The ACLU notes the distressing

---

was sick or sleeping would destroy the social worker's relationship with the parent.

[14] Indeed, the ACLU's arguments (Br. at 6-7) suggest that state and local governments would be better advised to eliminate such services entirely; for although they are concededly not constitutionally compelled, they are said to furnish a basis for liability once undertaken.

statistic that there were 2,250,000 reports of suspected child abuse or neglect in 1987. ACLU Br. at 44. In many cases, there will be indications that, in hindsight, might have alerted a social worker to possible abuse. Especially given petitioners' contention that nonintentional (*i.e.*, reckless or grossly negligent) behavior is sufficient to bring a Section 1983 action to a jury, there is every reason to expect claims like petitioners' to proliferate.

3. *Reversal would create a generalized constitutional right to government protective services.*

The federal courts are not underutilized. The proposed (although deficient) constitutional basis of petitioners' claims cannot be confined to cases of suspected child abuse in any principled way. Where a government agency or official is aware that an individual citizen is at risk and responds in a manner judged in hindsight not to be adequate, new classes of cases will be brought—in volume—under Section 1983. Among the most obvious categories of defendants are police officers, parole officers, paramedics, prison guards, and state-employed physicians, including psychiatrists.

It is not speculation that these cases will be brought. Beginning with *Martinez v. California*, 444 U.S. 277 (1980), a suit against the California Parole Board, these cases have been filed even without encouragement from this Court.[15] In the end, the federal courts will be compelled to create a common law governing the actions of these additional classes of defendants as well as child abuse caseworkers.

Foster care services would be particularly vulnerable to this type of litigation. Two circuits have already held

[15] *See, e.g., Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (en banc) (paramedic service); *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030 (11th Cir. 1987) (ambulance drivers); *Commonwealth Bank & Trust Co. v. Russell*, 825 F.2d 12 (3d Cir. 1987) (prison officials).

that these suits are cognizable.[16] Reversal in this case, where the child resided with his natural parent, would necessarily imply corresponding duties for government agencies continuously to monitor foster care agencies and foster parents. The financial consequences of liability could substantially impair, if not destroy, foster care services in many States.

In sum, a decision recognizing petitioners' claims under the Due Process Clause would be far-reaching and pernicious. There is neither a constitutional foundation nor a practical justification to warrant a massive federal intrusion into areas that are quintessentially the province of the States.

II. THE COURT SHOULD NOT TRIVIALIZE THE DUE PROCESS CLAUSE BY PERMITTING SECTION 1983 ACTIONS TO PROCEED TO TRIAL ON ALLEGATIONS OF GROSS NEGLIGENCE OR RECKLESSNESS.

The Due Process Clause prohibits "*deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (emphasis in the original).[17] It is intended to prevent "abuse of power by the government." *Id.* at 330. *Daniels* relied heavily on Justice Powell's opinion in *Parratt v. Taylor*, 451 U.S. 527 (1981), which had concluded:

> A "deprivation" connotes an intentional act denying something to someone, or at the very least, a deliberate decision not to act to prevent a loss. The most

[16] *See Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), *pet. for cert. filed*, 56 U.S.L.W. 3290 (U.S. Sept. 25, 1987) (No. 87-521); *Doe v. New York City Dep't of Social Services*, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983).

[17] Of course, the Court need not reach this question if it finds that petitioners have not been deprived of an interest protected by the Due Process Clause.

> reasonable interpretation of the Fourteenth Amendment would limit due process claims to such active deprivations.

Id. at 548 (concurring opinion). *See also Estelle v. Gamble*, 429 U.S. 97, 105 (1976) ("deliberate indifference" to prisoner's serious illness or injury sufficient to constitute cruel and unusual punishment under the Eighth Amendment); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("the touchstone of due process is protection of the individual from arbitrary action"); *cf. West v. Atkins*, 108 S.Ct. 2250, —— (1988) (Scalia, J., concurring) ("deliberate indifference" by physician causing physical harm to prisoner constitutes the deprivation of liberty without due process).

"Abuse of power" strongly suggests that intentional malfeasance is required to state a claim of constitutional stature.[18] At the very least, it requires such deliberate indifference that intent can be inferred. For example, in *Estelle v. Gamble*, 429 U.S. 97 (1976), the allegations of deliberate indifference held sufficient to state an Eighth Amendment claim concerned the indifference "by prison guards in *intentionally* denying or delaying access to medical care or *intentionally* interfering with the treatment once prescribed." *Id.* at 104-05 (emphasis added). Claims based on negligence do not suffice. *See Daniels, supra; Davidson v. Cannon*, 474 U.S. 344 (1986). Nor, in our view, do claims of gross negligence or even recklessness.[19] Permitting the trial of such allegations in

---

[18] The cases cited in the text all arose in the prison context, where the State, having assumed physical custody, might well be held to a higher standard of care because of its assumption of responsibility for personal security. See pages 10-12, *supra*.

[19] Neither *Smith v. Wade*, 461 U.S. 30 (1983), nor Justice O'Connor's dissent in *City of Springfield v. Kibbe*, 107 S. Ct. 1114, 1121 (1987), casts any light on the state of mind necessary to show a violation of the Due Process Clause. *Smith v. Wade* was

federal court would eviscerate the Court's repeated decisions that garden-variety tort actions against state officials must be brought under state law. *See, e.g., Daniels*; *Davidson v. Cannon*, 474 U.S. 344 (1986); *Paul v. Davis*, 424 U.S. 693 (1976).

Gross negligence is simply negligence "with the addition of a vituperative epithet" (*Wilson v. Brett*, 152 Eng.Rep. 737, 739 (Ex. 1843) (Rolfe, B.)); and recklessness, also an aggravated form of negligence, can be defined as lack of due care in the presence of an obvious risk of harm.[20] Like simple negligence, gross negligence and recklessness are insufficient to show the abuse of power required by *Daniels*.[21] Especially where, as here, injury results from violence inflicted by private persons, an official's failure to prevent it is not an "abuse of power," unless that failure is deliberate and knowing.[22]

---

concerned with the state of mind necessary to support punitive damages under Section 1983. *Smith v. Wade* explicitly distinguished the state of mind necessary for punitive damages under the statute from the state of mind necessary to show the underlying constitutional violation. 461 U.S. at 50.

Similarly, Justice O'Connor's opinion in *Kibbe* dealt only with the state of mind sufficient to establish a policy under *Monell v. Department of Social Services*, 436 U.S. 658 (1978) (discussed *infra*, Part III), without discussing whether reckless conduct can give rise to a due process violation.

[20] See W. Prosser & W. Keeton, *The Law of Torts* 213, 214 (5th ed. 1984).

[21] *See Hogan v. City of Houston*, 819 F.2d 604, 605 (5th Cir. 1987) (gross negligence insufficient); *Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986) (same).

[22] It is not necessary to decide in this case that no behavior that could be called "reckless" can ever constitute a due process violation. For example, there may be instances of criminal recklessness

Unintentional actions, even when they are grossly negligent, do not violate the Due Process Clause. Gross negligence is not, as petitioners and the ACLU argue, analogous to "deliberate indifference." *Estelle v. Gamble* equated deliberate indifference with intentional conduct (see page 20, *supra*).

Holding allegations of gross negligence or recklessness sufficient to state a claim would, in practical consequence, overrule *Daniels*. *Daniels* noted that the difference between intent and negligence "is abundantly clear." 474 U.S. at 335. The distinction between negligence and recklessness, let alone gross negligence, is not.[23] Many tort lawyers routinely plead negligence in the alternative as gross negligence or recklessness. The complaint in this case (¶ 44, J.A. 11) is an example. If it is held to state a claim, plaintiffs will simply satisfy the pleading requirements and proceed in federal court. Moreover, because allegations of gross negligence or recklessness raise questions of fact, they are ordinarily not subject to dismissal or summary judgment prior to trial.

---

that are tantamount to intent and could therefore require a different analysis. *Cf. Whitley v. Albers*, 475 U.S. 312 (1986). In this case, however, Ms. Kemmeter at the most "recklessly" failed to act effectively to prevent the abuse of Joshua DeShaney. Petitioners have adduced no evidence that she (or any other respondent) intended that harm come to Joshua or was deliberately indifferent to his plight. Ms. Kemmeter's repeated visits and her own notes (*e.g.*, "I continue to have a great deal of concern over the welfare of Joshua" (J.A. 118)) are strong evidence to the contrary.

[23] Petitioners certainly do not explain the distinctions between negligence and gross negligence or recklessness. They assert that respondents' alleged "misconduct" was "beyond mere negligence" (Pet. Br. at 33), but they offer no further characterization or explanation of their "beyond mere negligence" standard.

Ultimately, the concepts of gross negligence and recklessness cannot appropriately be applied to the services provided by government officials. Those officials are required, with limited resources, to evaluate risks on a daily basis. A police desk sergeant must decide the order in which the police will respond to emergency calls. Overloaded caseworkers must decide the relative seriousness of all cases of suspected child abuse. Hindsight can make any decision look reckless when, as here, tragic consequences ensue. If gross negligence or recklessness claims are actionable under the Due Process Clause, the day-to-day functioning of state and local government officials will become a constant source of Section 1983 litigation. Plainly, that Clause was never intended to encompass the routine administration of state and local governments. *See Davidson v. Cannon*, 474 U.S. at 347-48. Given the Court's concern not to trivialize the Due Process Clause, it is neither necessary nor sensible to divert a potentially limitless volume of ordinary tort cases from state to federal court for trial.

III. NO POLICY HAS BEEN SHOWN TO ESTABLISH THE COUNTY'S LIABILITY UNDER *MONELL v. DEPARTMENT OF SOCIAL SERVICES.*

Even if petitioners could establish first, that petitioners had a constitutional right to government intervention to prevent Randy DeShaney's abuse of Joshua, and second, that respondents' actions (or nonactions) deprived them of that right in a manner proscribed by the Due Process Clause, the principles of local government liability under Section 1983 first delineated in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), would preclude any recovery from the County and the Department.[24]

---

[24] Although the *Monell* issue was not addressed by the courts below, the Court may rely on grounds not previously raised to affirm the judgment of the lower court. *Dandridge v. Williams*, 397 U.S. 471, 574 n.6 (1970). Because petitioners' own submissions establish the absence of the requisite policy under *Monell*, a remand for further consideration of this issue is not necessary.

In *Monell*, the Court held that local government agencies could be held responsible under Section 1983 for the acts of their employees only if those acts were executed pursuant to a "policy or custom." 436 U.S. at 694. The policy or custom must be " 'the moving force of the constitutional violation.' " *Polk County v. Dodson*, 454 U.S. 312, 326 (1981), citing *Monell*, 436 U.S. at 694. Implicit in *Monell* is the recognition that local governments should not routinely face damage claims for alleged constitutional violations by their employees unless such bodies are directly responsible for the violations.

In this case, the County's operative policy was "to seek out and prevent child abuse." Pet. Br. at 19. As petitioners themselves explain, the Department's Child Protection Unit was created "in response to the declared policy of Wisconsin law mandating specific efforts to protect endangered children and intervene on their behalf." *Id.* at 4. Petitioners' claims against Ms. Kemmeter thus rest in large measure on her alleged failure to follow the Department's guidelines. See *id.* at 7 (failure to visit frequently); *id.* at 8 (failure to inform natural mother of risk).

Petitioners cannot have it both ways. Having asserted that their due process deprivation resulted from Ms. Kemmeter's failure to follow the County's policy, they cannot also claim (as they must under *Monell*) that the policy itself caused the violation of their constitutional rights.

Even if petitioners could show that County policy played a causal role in any constitutional violation, liability against the County and the Department would be barred by the rule of *Monell*, as explained in later cases. First, as the plurality opinion articulated in *City of St. Louis v. Praprotnik*, 108 S.Ct. 915, 926 (1988), a local government "cannot be held liable under § 1983 unless [the claimant] proved the existence of an unconstitutional

municipal policy." [25] Here, petitioners do not dispute the constitutionality of the County's avowed policy, and, like the claimant in *Praprotnik*, they have adduced no evidence that departure from that policy was either authorized by County policymakers or sanctioned by widespread custom or practice.

Second, petitioners' only evidentiary basis for the County's liability is Ms. Kemmeter's failure to intervene in this single case. Because *Monell* precludes respondeat superior liability for her alleged shortcomings, petitioners cannot pursue their claims against the County and the Department based on Ms. Kemmeter's violations of their policies. In *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), the plurality concluded that a single incident of misfeasance by a subordinate cannot provide the sole basis for inferring a policy under *Monell*. *Id.* at 824.[26] To find the County or the Department liable on the facts of this case, given the absence of direct evidence that they were at fault, would impose respondeat superior liability in another guise.

IV. THE INDIVIDUAL RESPONDENTS ARE ENTITLED TO OFFICIAL IMMUNITY.

Just as the absence of a policy defeats petitioners' claims against the County and the Department, official immunity

---

[25] As *amici* have urged the Court in a brief *amicus curiae* submitted in *City of Canton v. Harris*, No. 86-1088, this conclusion follows logically from *Monell* and its progeny, *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); and *Praprotnik*. Our brief in *City of Canton* is being served on the parties to this case simultaneouly with this brief.

[26] Because Ms. Kemmeter was not a municipal policymaker, the County respondents cannot be liable for the single alleged episode of incompetence on which their claims are based. *See Praprotnik*, 108 S.Ct. at 924; *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

protects the individual respondents from liability.[27] Accordingly, the judgment of the court of appeals should be affirmed even if a constitutional violation were shown.

It requires little analysis to show that the individual respondents cannot be held liable in this case. Child welfare workers, as executive officials performing discretionary functions, have routinely been held entitled to qualified official immunity. *See Austin v. Borel*, 830 F.2d 1356, 1363 (5th Cir. 1987); *Jensen v. Conrad*, 747 F.2d 185, 195 (4th Cir.), *cert. denied*, 470 U.S. 1052 (1984); *Donald M. v. Matava*, 668 F.Supp. 703, 707-13 (D. Mass. 1987).

It is now settled that qualified immunity protects officials from suit "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Given the novelty of petitioners' claims, Ms. Kemmeter and Ms. Stelse could not have known that they had an affirmative constitutional duty to a child residing with his father. There was no published case on point until more than a year after the alleged due process violation (*see Estate of Bailey v. County of York*, 768 F.2d 503 (3d Cir. 1985)), and no clear rule has emerged even today. *See Harpole v. Arkansas Dep't of Human Services*, 820 F.2d 923 (8th Cir. 1987) (no constitutional duty to prevent child abuse where the child resided with his parent). Because the individual respondents' conduct unquestionably fell within the scope of qualified immunity, they were entitled to summary judgment on this separate ground.

---

[27] Although respondents pleaded official immunity in their answer (Answer, Affirmative Defense No. 2, J.A. 28), and raised this issue in the district court, neither the district court nor the court of appeals considered official immunity in ruling in favor of respondents. As with *Monell*'s limitations on municipal liability, official immunity is offered in support of the judgment below. *See Dandridge v. Williams*, 397 U.S. at 475 n.6.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

DOUGLAS A. POE
KENNETH E. WILE
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

August 12, 1988